



## Loan Charge Morse Review Loan Charge Action Group briefing

### Introduction

In September 2019 Sir Amyas Morse was commissioned by the Treasury to undertake to review the Loan Charge and issued his report on his review in late December 2019. The Government have accepted all but one of the recommendations and the draft legislation to bring into force these changes has very recently been published, which will be enacted in this year's Finance Bill (2020).

Whilst the Loan Charge Action Group welcomes a number of the recommendations of changes to the Loan Charge, **we wish to make it clear that the changes simply do not go far enough and do not help or indeed provide assistance to the vast majority of those people impacted by the Loan Charge.**

### Executive Summary

The Morse Review recommendations (watered down by the Government) do not fairly deal with the unquestionable unfairness of the Loan Charge or end the Loan Charge Scandal. **At least 40,000 people and their families are still facing life-ruining bills for tax that has never been legally proven to be due, bills that will force some into bankruptcy and into selling homes. There will still be a risk of further Loan Charge suicides.**

One key conclusion of the Morse Review, that “the law was clear from 2010” does not bear up to scrutiny and this document explains why this conclusion is wrong and therefore the conclusion that the Loan Charge should still apply retrospectively from 2010 to 2016/17 is wholly unjustified.

### Key Points of the Morse Review

The Morse Review key conclusions are as follows, it has recognised:

- that the Loan Charge overrides statutory time limits on taxpayer investigations;
- that the Loan Charge, as legislated, looks back 20 years (ie retrospective/retroactive) and that this did not strike the “right balance” of being fair nor indeed proportionate. He sought to correct this injustice by recommending that such look back should be restricted to 10 years;
- that the law was made clear in December 2010, after this date schemes “did not work”;
- that taxpayers are fully entitled to rely on the prevailing law as interpreted by the courts;
- that around 40% of those who have not settled earn less than £30K per year; More than a quarter earn less than £20k;
- that the lower a person's income, the less affordable the amount of the Loan Charge or settlement becomes.

## Changes Recommended by the Review and the Government Response

### The primary recommendations of the Morse Review are as follows:

- that the Loan Charge should apply only to loans provided after December 2010 and not from the earlier date of 1999 (which Government has accepted);
- that Loans provided between December 2010 and April 2016 should be classified as exempt from the Loan Charge where they were “reasonably disclosed” to HMRC. (We note that Government has amended this classification to having been “fully disclosed”);
- that all loans provided after April 2016 (when the Loan Charge was announced) are subject to the Loan Charge (which Government has accepted);
- that all voluntary payments made in lieu of settlements are to now be refunded, in such circumstances where that person would have been latterly classified as exempt from the Loan Charge following the review recommendations (which Government has accepted);
- the option to spread settlement payments of the Loan Charge over three tax years instead of one tax year (which Government has accepted);
- that no one will be required or obliged to pay more than half of their “disposable income” in any one year, except those with “very high disposable income” (which Government has partially accepted);
- that after 10 years any remaining tax liability shall be written off for those earning less than £30k per year (which Government has rejected).

### Effect of the Recommended Changes

HMRC have stated that they believe that the changes resulting from the recommendations being adopted will result in an estimated 11,000 being “released from their loan charge obligations altogether” (which in itself still suggests that firstly money is owed, and secondly they are being “let off”). They also state that a further 30,000 are likely to see the amount of money that they owed to HMRC being reduced. **When the amounts of money in dispute are so life changing that even with a modest reduction, many thousands of people will still face extreme financial hardship and some will still be forced into bankruptcy or to sell homes.**

The Loan Charge Action Group believes that there are many more people affected by the Loan Charge than the 50,000 people referred to by HMRC, therefore there will be many more people – at least 40,000 – still facing huge bills, in many cases unpayable ones, after the proposed Government changes. So the Morse Review does not end the nightmare for thousands of people and there will still be people who have no choice but to go bankrupt and to sell homes. People are and will still face family and mental breakdown and there remains a serious risk of further suicides, on top of the seven already reported suicides of people facing the Loan Charge. The Morse Review conclusions do not, alas, change this.

## The Conclusion that “the law was clear from 2010” is wrong

The Morse Review concluded that from 9<sup>th</sup> December 2010 that the law was clear that loan arrangements were unacceptable.

**This is a flawed conclusion given the following:**

- The 2010 change (which did not come in to effect until 2011) made it clear that loans from third parties to employees were unacceptable, but **it did NOT however make it clear for those who were self-employed** or for loans to company directors. Most of those entering into loan arrangements from December 2010 onwards, *were conducted on a self-employed basis*. **It is simply both misleading and wrong to therefore suggest that the 2011 legislation made the law clear in this regard, when in fact it clearly and comprehensively did not apply to the arrangements people were entering into.** If indeed the legislative position was as clear as HMT/HMRC states then is it not reasonable to suggest that promoters of such schemes were acting illegally, and yet no significant action has been undertaken against the promoters.
- The law was changed again, previously to cover the arrangements that had not been covered in the 2011 legislation. **So it was only the 2017 legislation (introduced in 2016) that made clear that these arrangements were unacceptable** and would be subject to the Loan Charge.
- People had sought and taken professional advice, including that from reputable/chartered tax professionals, who advised that **the arrangements were not subject to the 2011 legislation and were therefore tax law compliant and not liable to income tax**. The people who promoted and recommended these schemes are not being asked to pay a penny; yet those who took their advice are facing life-ruining bills.
- **If the law had been clear from 2011, then the Loan Charge would never have been needed at all!** HMRC could have pursued people through the courts, but chose not to do so. If the position was clear from 2010 then why have HMRC not dealt with those matters in the appropriate manner, why have enquiries not been concluded and closure notices issued and why have cases not been litigated where necessary. HMRC have not even attempted to close enquiries or litigate cases because they were not confident of winning, instead they have looked to the Loan Charge to bypass the law and the courts and to cover up their own inaction.
- HMRC themselves said in December 2016 that they were legislating to bring self-employed loans into the scope of the legislation, which makes clear this was not the case before.
- **HMRC did NOT communicate to taxpayers that these arrangements were unacceptable and potentially liable to tax during this time.** The message was not even communicated until the publication of “Spotlight 33” in July 2016, an e-newsletter published on the HMRC website, which is accessed primarily by tax advisers (circa 500 confirmed readers).

## Small & Medium Businesses Directors have been excluded

The Loan Charge affects not only individual contractors, but also small and medium sized business owners and directors that are severely impacted by the Loan Charge.

**The revised Loan Charge guidance published by HMRC focuses solely on the individual and does not consider guidance for Small – Medium Businesses (“SMBs”).** This is strange and seriously

problematic for this group of people, as it is still as yet unclear if they will be subject to any of the changes.

Several concerning initial observations have been made where a lack of clarity exists, and these are:

1. **Disclosure** – the current draft Loan Charge legislation only mentions disclosure being made on “tax returns”. Often the most common way to have disclosed the use of a Loan Arrangements for SMBs was through the Annual Reports and Accounts and not the Self-Assessment Tax Return. The legislation would be more balanced were it to simply ask the question, “Were HMRC aware of the use of loan arrangements but failed to take action?” This should be irrespective of how HMRC were made aware.
2. **Enquiries** – the draft legislation is surprisingly quiet with regards to HMRC ‘taking action’, there is no clarity in the cases where enquiries were made on the company and not the individual and whether those years would still be included in the Loan Charge. Further guidance is required for businesses and the burden of proof should lie with HMRC to demonstrate that they have acted within the statutory timelines.
3. **Double taxation** – When a company has been dissolved, the tax liability has been discharged. It is unclear how the Loan Charge legislation can attempt to transfer such loan charge debt to another person, such as a former Director, as this constitutes double taxation.

It is clear that the guidance that has been published to date does not cover key elements relating to how the Loan Charge will affect and be applied to SMBs.

### More Action Required – a proper and fair resolution to the Loan Charge

**The Loan Charge Action Group is calling on MPs to push for further changes to the Loan Charge to end all retrospection and to restore the rule of law.**

- **the date at which the Loan Charge should be applied therefore should be immediately amended from December 2010 to the date of Royal Assent of the Finance Bill in 2017**
- the Government must now accept the Morse Review recommendation that **unprotected/closed tax years should now remain closed** on the basis of ‘reasonable’ and not ‘full’ disclosure.
- that closed years **should be defined as always understood** i.e. unprotected years whether enquiries had been opened and subsequently closed or whether HMRC had either opened an enquiry but not acted on it (stale), or never opened an enquiry and are now out of time to do so.
- That the Government must accept the Morse Review recommendation that **those with incomes under £30,000** should have any outstanding balances written off after 10 years.
- that the legislation must cover business owners and directors as well as individual contractors.

Only with these changes will the clear injustice of the retrospective nature of the Loan Charge be removed.

Only with these changes will it bring an end to the nightmare experienced by thousands of families facing unpayable demands for arrangements that they were advised to use and sums that have never been legally proven to be due.