ICAS welcomes the opportunity to comment on the HM Treasury/HMRC consultation document entitled “Statutory Definition of Tax Residence” and the additional time granted to submit our response.

We have been in favour of the concept of a statutory residence test for many years and support the Government’s intention to create a statutory residence test although we are concerned that the test currently being proposed is more complex than may be necessary. Nevertheless, we feel that a statutory test of the kind proposed, although complex, will be preferable to the current position and its lack of certainty.

We welcome the fact that a number of the comments made in response to the consultation document published on 17 June 2011.

Throughout the draft legislation there are a number of terms such as “home” which, although fundamental to the test, are not sufficiently defined to allow taxpayers with complex affairs to determine their residence status. We feel it is especially important to use terms which are sufficiently well defined within the legislation itself or elsewhere in law so that taxpayers will know whether or not they are resident in the UK for tax purposes and can, as a result, ensure compliance with any tax obligations.

We are concerned that the various day count tests in the draft legislation are inconsistent in format and style and recommend that this be corrected.

We are concerned that paragraph 3.203 of the document states that the HMRC online assessment tool will not be able to give a binding ruling. We feel that it is only worthwhile having HMRC provide an online tool to assist taxpayers in working out their residence status if it can be structured in such a way those taxpayers who use it can rely on the outcome it produces.

In the remainder of this response we have dealt with issues as they arise in the draft legislation and have referred back to the appropriate paragraph and/or question in the document where relevant.

Schedule 1 – Statutory residence test

**Question 1:** How far would increasing the number of working days allowed in the UK under the Full Time Work Abroad condition from 20 to 25 days mitigate concerns about the impact on employers and their employees?

**Sub-paragraph 6(4) – full-time work overseas**

We take the view that an increase in the days to 25 would be an improvement but would still only allow employees to work for two days a month in the UK which may be an issue for senior employees having to report to their UK employer each month. The document states the Government envisages that either the number of work days should be increased or the number of hours per day required to constitute a work day should be increased. However, we believe that both changes should be introduced.

**Question 2:** How far would increasing the number of hours that constitute a working day from three to five hours mitigate concerns about the impact on employers and their employees? How far would it reduce record keeping requirements?

**Sub-paragraph 5(5) – full-time work in the UK**

We would be strongly in favour of an increase in the number of hours from three to five hours as this is a period closer to a full-time work day. However, we do not see that an increase to five hours would reduce record keeping as it will still be necessary for taxpayers to keep records of what they did during their time in the UK and what periods were spent travelling for work. We are also concerned that it will be difficult for individuals to be able to show that they have not been working whilst in the UK. As noted above, we strongly favour an increase in the number of hours to five as well as an increase in the relevant number of days rather than only one of these being increased.
**Question 4: Would there be significant benefits in increasing the qualifying period for FTWUK from nine months to 12 months? What would the benefits be?**

There would be benefit to individuals on short term work assignments to the UK as they would be less likely to become automatically resident under this test whilst in the UK for a short period.

**Sub-paragraph 5(8) – residence of deceased taxpayers**

As there is lack of certainty as to the meaning of “home”, we do not regard it as appropriate to refer to the deceased’s “normal home” being in the UK in sub-paragraph (d) without giving some clarification other than that P could be living temporarily overseas at the time and still have his normal home in the UK.

**Paragraph 12 – days spent in the UK**

Whilst we welcome the inclusion of the “exceptional circumstances” provisions in paragraph 12, we would request that sub-paragraph (5) makes it clear that, as we understand from discussions on the document, a sudden or life-threatening illness or injury to a close family member of the taxpayer will also be included. In addition, we feel that the experience of recent years of strikes or adverse weather conditions such as snow causing major transport cancellation should be included.

The words “is limited to” in the second line in paragraph 12 (6) are unnecessary as the sub-paragraph begins with the words “the maximum number of days”.

**Question 5: Do you think there is a risk of manipulation of the midnight rule? If so, how do you think it could be addressed in a targeted way?**

Travel arrangements to and from the UK have been arranged with the rule in mind since the midnight test was introduced in FA 2008. However, given the costs involved in travelling to and from the UK it is unlikely that many people will manipulate the midnight rule unless they have access to a private jet.

We would have concerns that the introduction of a TAAR as set out at paragraphs 3.153 and 3.154 of the document, could lead to unnecessary uncertainty for the majority of taxpayers.

**Paragraph 14 – “home”**

The definition of “home” which appears in paragraph 14 is quite unhelpful especially as two of the automatic residence tests and the split year tax treatment for those going to live abroad are based on the concept of “home”.

Without a specific definition of “home” for this purpose, there is likely to be substantial uncertainty as there are several dictionary definitions which have somewhat different meanings.

Paragraph 14 states that a home can be any place even though the taxpayer has no estate or interest in it. Paragraph 3.88 of the document states that a property which is rented would be capable of constituting a home but the definition in the draft statute seems to be wider than this and could include living with parents or other family members on an informal basis. If such arrangements are to be included within the definition of “home”, we feel that this must be made clear in the legislation, particularly since in the context of UK ties the wider term “available accommodation” rather than “home” is used.

Paragraph 3.89 of the document states that a “home” does not mean that any accommodation in which the individual spends time would be a “home” and that “home” does not include a holiday or weekend home or a temporary retreat. In the context of someone with more than one home, it is often the case that one home will be used only at weekends or during holidays. We are concerned at the lack of precision surrounding the meaning of “home” and would urge that this be clarified in the legislation.
There is further lack of clarity in sub-paragraph 14(3) where it is provided that a place that was the taxpayer’s “home” does not continue to count merely because he continues to hold an estate or interest in it after he has moved out but there is no definition of having “moved out”. The draft legislation and the comments in the document do not deal with this aspect sufficiently.

**Paragraph 15 – work**

Sub-paragraph 15(4)(b) provides that time spent travelling counts as time spent working if the individual does something else during the journey that could itself count as work – does this mean that if the individual spends say one hour working during a four hour journey that the whole period of the journey (which would not otherwise qualify under sub-paragraph 15(4)(a) as work) will be classified as work? The impact of this could create a harsh result.

**Paragraph 16 – location of work**

Sub-paragraph 16(2) - as all business travel is likely to be work it needs to be clear what the position will be regarding time spent at airports after the point of disembarkation, for example in queues at passport control or waiting for delayed luggage or connecting flights (for example from Heathrow to Scotland) as it seems harsh to count this as work in the UK.

The tax residence of those who are travelling from home to work abroad may depend to some extent on how far they live from an embarkation point, particularly if the three hour working day limit is retained, which cannot be fair. This is especially true for individuals living in Scotland who have to travel through a hub airport in the South of England.

**Paragraph 17 – full-time work**

Paragraph 3.48 of the document states that the 35 hours work requirement is to be an average “over the whole period of full-time work” but this does not seem to be what the tests in sub-paragraph 5(5) (which refers to the period of 276 days of work in the UK) or in sub-paragraph 6(4) (works overseas for full tax year) when read with paragraph 17 require. This should be clarified.

We cannot see why public holidays are not treated in the same way as annual leave in sub-paragraph 17(3) particularly as many overseas countries have more public holidays than does the UK.

It should be made clear exactly what factors are to be taken into account in deciding what reasonable amounts of annual leave are as the inclusion of the words in sub-paragraph 17(4) are likely to give rise to uncertainty.

The important issues of periods of “garden leave” when changing employment or periods of maternity/paternity leave should be included in the legislation.

**Paragraph 22 – accommodation tie**

We feel that the one night requirement is too short given that the definition of “available accommodation” is so wide.

In our view, paragraph 22 (4) creates uncertainty as to when an individual is to differentiate between time spent as a guest of a close relative as opposed to having available accommodation with a close relative.

Sub-paragraph 22(6) does not cover close relatives of persons living together as husband and wife/civil partners which if they are to be included at paragraph 20(2) could give rise to inconsistency of treatment.
Part 3 Split tax year treatment

It is an indication of how complex the current tax system is that the statutory provisions on split year will require more than 14 pages of legislation whereas some other countries have managed this in a much simpler way.

Paragraph 34 – general rules

We are concerned that there are no adequate definitions given for terms used here such as “normal home”.

Part 4 Anti-avoidance

Not all of the rules have been published at present so we have no comments other than to say that we welcome the confirmation at paragraph 3.191 of the document that the anti-avoidance rules will not apply to earnings from employment and self-employment and regular investment and savings income.

Paragraph 111 – Transitional provisions

We welcome the possibility for election for the statutory residence test to apply in relation to pre-2013/14 years where those years determine the operation of the new rules after 5 April 2013.

However, there appears to be a conflict between the wording of paragraph 111 and paragraph 3.198 of the document.

Schedule 1 – Ordinary residence

General comment

In general terms, we welcome the decision to abolish ordinary residence and introduce an overseas workday relief. However, we are concerned that the opportunity for a simple provision that the relief will be permitted for an arriver’s first three years of UK residence where they are non-domiciled and come to work full time in the UK has been missed. The need to consider “intention” retains the likelihood of litigation and substantial uncertainty.

Question 6(a): Will any of the consequential changes have a disproportionate impact on particular individuals, allowing for the fact that there will be transitional grandfathering provisions? If so, how would you suggest mitigating that impact?

Question 6(b): Do you think transitional provisions are needed for any other places where ordinary residence influences tax liability?

We suggest that the transfer of assets provisions should not apply to non-domiciled individuals during the first three years of residence.

Question 7(a): Would the revised approach be effective at restricting Overseas Workday Relief to employees who are not based in the UK?

We consider that this relief should be available through the first three years of residence whether or not the individual is based in the UK.

Question 8(a): Do you think some or all of the factors determining whether an employee is based in the UK beyond the three-year point should be conclusive rather than indicative?

Question 8(b): Can you suggest any other factors which would strongly indicate that an employee will be based in the UK beyond the three-year point?

We consider that this relief should be available through the first three years of residence whether or not the individual is based in the UK.
About ICAS

ICAS is the world’s oldest professional body of accountants, having received its Royal Charter in 1854. Since then ICAS has played a leading role in the accountancy profession. The Institute’s main objective is to uphold the integrity and standing of the profession of chartered accountancy in the interests of society and the membership. We have approximately 19,000 members spread throughout the world and many chartered accountants hold key positions in commerce, industry, the public sector and private practice.