

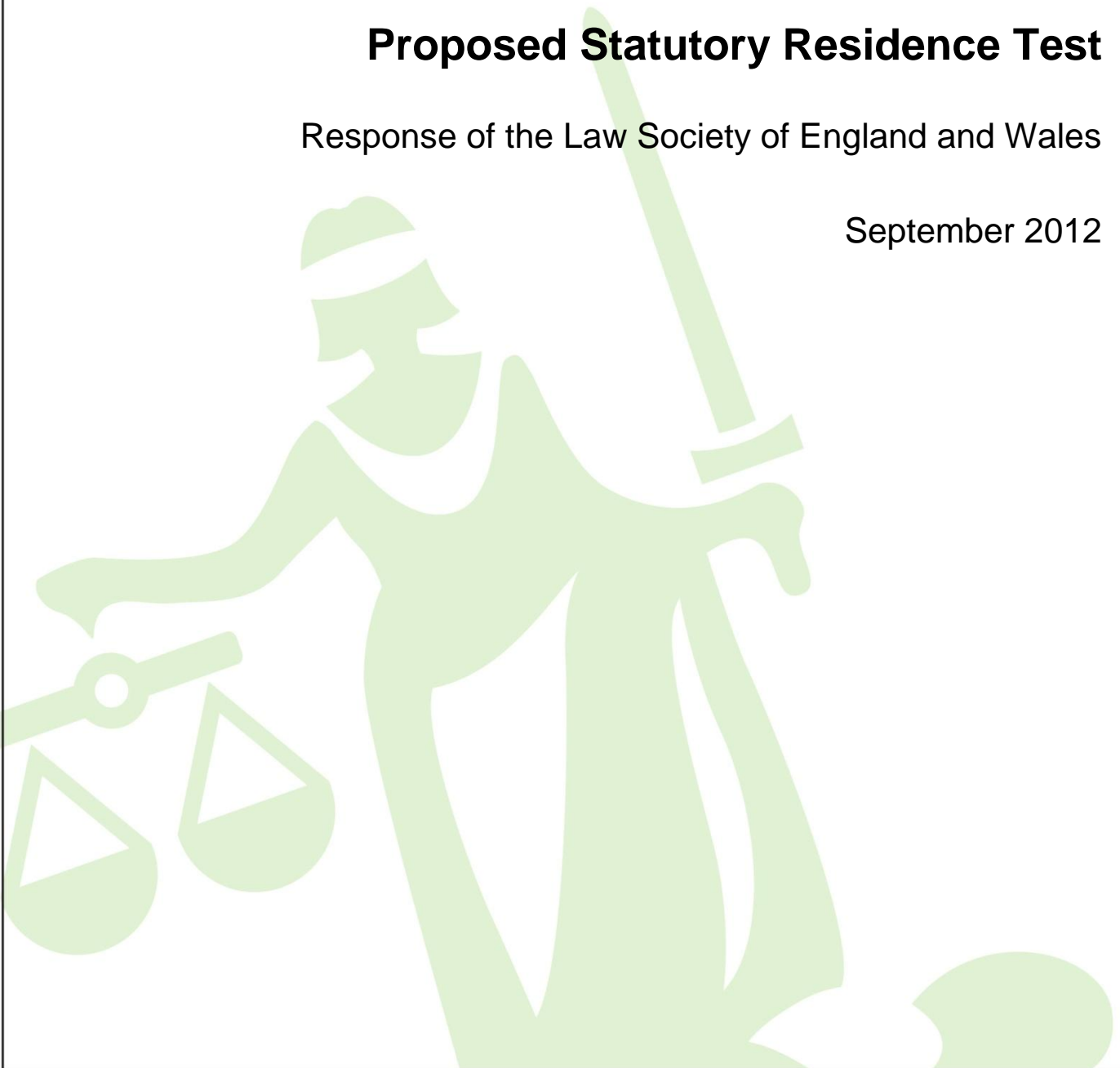


The Law Society

Proposed Statutory Residence Test

Response of the Law Society of England and Wales

September 2012



Introduction

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others.

We are pleased to have the opportunity to respond to the Consultation Document on the proposed Statutory Residence Test.

This response has been prepared on behalf of the Law Society by the members of the Tax Law Committee. The Committee is made up of senior and specialists tax lawyers from across the country.

Questions

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?

We consider that increasing the number of working days allowed in the UK under the Full Time Work Abroad condition from 20 to 25 days would to a degree mitigate concerns about the impact on employers and their employees, as it would allow employees who work full time abroad to report back to a UK employer on two working days a month in the UK during the year.

However, if the cost of the increase to 25 days is that the number of hours that constitute a working day remains at 3 hours not 5 hours (see question 2), we consider that this option should not be chosen i.e. reluctantly, we would prefer a working day to require 5 hours and consequently limit the number of days to 20, rather than permit more days, but of a shorter duration. We believe that both changes i.e. to 5 hours and to 25 days would be consistent with the policy underlying the legislation i.e. focus on a substantive UK connection. We feel that it should not be necessary to make a choice between the two options. If a choice has to be made we would prefer that the working day definition should be altered to 5 hours.

Question 2. How far would increasing the number of hours that constitute a working day from 3 to 5 hours mitigate concerns about the impact on employers and their employees? How far would it reduce record keeping requirements?

We consider that increasing the number of hours that constitute a working day from 3 to 5 hours would mitigate concerns about the impact on employers and their employees as 5 hours is closer to a conventional 'working day'. In the context of FTWA it would allow a person to carry out a reasonable amount of work in the UK before meeting the definition of a UK work day.

Whether the increase to 5 hours would reduce record keeping requirements depends on the extent to which taxpayers will be expected to keep records to evidence the fact that they are *not* working.

Question 3. Can you suggest any other ways to amend the definition of FTWA, in keeping with the requirement for an objective definition?

We have no comments.

Question 4. Would there be significant benefits in increasing the qualifying period for FTWUK from 9 months to 12 months? What would the benefits be?

Yes. Many postings in the UK last at least 12 months so the increase to 12 months would fit in with employment practices. In addition having a period of 12 months makes the FTWUK text symmetrical with the FTWA text.

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?

We do not consider that there is a significant risk of manipulation of the midnight rule, however, HMRC may wish to monitor the issue and take action to counter such manipulation if necessary. The proposed SRT is already complex and long with anti-avoidance protection – further rules should be avoided if possible.

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?

We have no comments.

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

We have no comments.

Question 7:

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

We note that the proposal is that individuals will not be eligible for OWR if they are 'based' in the UK *and* it is reasonable to assume that they will continue to be based in the UK beyond the 'three-year point'. An employee is 'based' in the UK if the employee is there for a 'substantial part of his time'. It is not clear how long this is.

Among the factors that are indicative that an individual will be based in the UK beyond the three-year point is the purchase of a 'home' in the UK. It is not clear whether 'home' in this context would include the purchase of a vehicle as in paragraph 14 of the main part.

(b) Do you think it could deny Overseas Workday Relief to significant groups of employees who benefit from it under current rules?

We have no comments.

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?

No, we consider that there should be flexibility in making this assessment.

(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?

Other points we wish to make are as follows:

1. We consider that it should be possible to elect to be conclusively UK resident as it would allow certainty as to residence status.
2. Paragraph 3: We consider that the 'automatic residence test' should be called the 'automatic UK residence test' to distinguish it clearly from the 'automatic overseas test'.
3. Paragraph 12(5): We consider that the legislation should be clarified so it is clear that the exceptional circumstances exception is intended to cover events that affect people other than the individual taxpayer (for example the illness of a relative), and events which morally (as well as physically) oblige a person to remain in the UK.
4. Paragraph 14: 'Home' should be defined in the legislation. This is a fundamental concept in the legislation and the lack of definition will cause uncertainty.
5. Paragraph 16(2): We consider that the term 'embarkation point' should be defined in legislation. Thought should be given as to practical issues that may arise when a person's disembarkation point changes for reasons beyond their control (eg if the person's inbound plane is diverted from one UK airport (eg Heathrow) to another UK airport (eg Manchester) and then, after the passengers have disembarked and the plane is refuelled, the passengers reboard the plane and continue to the original destination).
6. Paragraph 17(6): We understand that if P changes employment during the period and there is a gap of longer than 15 days between the two employments, the intention is that 15 days can be

deducted from the length of the period in determining whether the test in paragraph 17(1) is met. This should be made clear in the legislation.

7. Paragraph 22(1) & (2): We consider that if a person reserves a hotel room for one day a fortnight for three months but only actually spends one night in the accommodation, that place should not be regarded as being continuously available for a period of 91 days. We consider that if consideration is payable for occupation of the accommodation, the person must actually spend the night in the accommodation in order for it to count towards the 91 days.
8. Paragraph 22(6): It should be made clear that a relative who falls within one of the categories of a 'close relative' but who is adopted counts as a close relative.
9. Paragraph 33: The split year concession in case 4 is limited, especially where P comes to the UK towards the end of the tax year as he may not have a home or work for the period required in paragraph 33(5).
10. There are specific provisions about how the split year applies to Part 7 and Part 7A ITEPA income but there is no reference to Part 6. One would expect the split year treatment to apply to employment income under Part 6 (EFRBS) in a similar way to that which applies for Part 7 purposes, but there is no mention of Part 6.

Case 1: starting full-time work overseas

11. Paragraphs 30(3) and (4) taken together impose a cliff-edge test: Case 1 will not be available unless the taxpayer starts full-time work overseas and from that date onwards does not exceed the permitted limits relating to days worked or spent in the UK. In a transition period between UK and overseas duties, individuals could be required to spend time physically handing over or briefing colleagues in the UK even after they have started their full-time work overseas. Those individuals in particular would be at risk of exceeding the working day limits (or not complying with their contractual obligations).
12. Paragraph 30(3) could therefore be amended to ensure that the split-year treatment is available to those individuals from a date after that on which their full-time work begins, as follows:

"There is a period during the relevant tax year during which the taxpayer works full-time overseas from a day until the end of the relevant tax year."
13. Alternatively, on the basis that the maximum day-count limit imposed by paragraph 30(4)(a) was not present in ESC A11, it would help to simplify Case 1 if paragraph 30(4)(a) were omitted in its entirety.
14. If paragraph 30(4)(a) is retained, we believe that the permitted number of hours is too low in the proposed draft (as noted in a different context in response to Question 2).

15. Paragraph 30(5) requires the taxpayer not to be resident in the UK in the year following the split year because the full-time work overseas conditions of the automatic overseas tests are met. (We note that not all of those conditions were set out in ESC A11.) We believe that it would be more appropriate for paragraph 30(5) to require the taxpayer not to be resident in the UK in the year following the split year because any of the automatic overseas tests are met: for example, an individual who takes up a full-time overseas and takes early retirement or is made redundant during the following tax year would not appear to qualify even if the individual had established himself abroad and does not come back to the UK.

Case 2: accompanying spouses etc

16. It would be helpful to clarify, in connection with the application of Case 2, whether a taxpayer who meets the conditions of paragraphs 31(2), (4), (5) and (6) will be entitled to split year treatment if the taxpayer and the partner split up after the deemed departure day but before the end of the relevant tax year. We acknowledge that such a clarification may be more suited to guidance than legislation.
17. Paragraph 43 refers to an 'acquisition' – does acquisition refer to the acquisition of rights or securities?
18. The draft legislation as it applies the split year concession to part 7A is still under construction, but how is it intended that this will work? Although the value of a relevant step is treated as employment income of the year of the step, section 554Z4 ITEPA already provides for a just and reasonable reduction where the deemed earnings are 'for' foreign duties in a year of non residence. One would expect payments from an EBT or EFRBS to be 'for' the years when the contributions were made for work done in those years. Is the step going to be regarded as 'for' the year of payment?