WHEN SAFEGUARDS BECOME STUMBLING BLOCKS: A CALL TO REMOVE THE STATE RESIDENCE REQUIREMENT FOR VOLUNTARY ASSISTED DYING IN AUSTRALIA

KATRINE DEL VILLAR,* RUTHIE JEANNERET** AND BEN P WHITE***

The requirement that a person has been ordinarily resident in a state for at least 12 months is the most litigated criterion of eligibility for voluntary assisted dying in Australia. The state residence criterion is problematic for people who live a nomadic lifestyle, spend long periods of time interstate or overseas, move between states for work, or have retired to another state. We analyse the case law on this issue, and the policy reasons for this eligibility requirement, and conclude that the original reasons for including this requirement are no longer persuasive. We consider options for reform. Although some of the problems this requirement causes may be ameliorated by introducing an exemption, or allowing mutual recognition of eligibility in another state, we recommend repeal of the state residence requirement. This has the advantage of legal and practical simplicity, avoids concerns about unconstitutionality, and is consonant with assisted dying laws internationally.

I INTRODUCTION

It is unlikely that Australian state and territory parliaments when (often heatedly) debating voluntary assisted dying ('VAD') laws would have foreseen that the most litigated issue in relation to these Acts would be residency requirements. Yet, this has been the case. Five cases relating to residency have been litigated in 2024 in Western Australia ('WA') alone,[1] and a further two cases have earlier been decided

* Dr Katrine Del Villar, Australian Centre for Health Law Research, Senior Lecturer, Faculty of Business and Law, Queensland University of Technology.

** Dr Ruthie Jeanneret, Lecturer in Ethics, Law & Professionalism, Academy for Medical Education, Affiliate Lecturer, TC Beirne School of Law, University of Queensland.

*** Professor Ben P White, Australian Centre for Health Law Research, Professor of End-of-Life Law and Regulation, Faculty of Business and Law, Queensland University of Technology. All translations are by the authors, except where otherwise indicated.

1 *AB v CD* (2024) 112 SR (WA) 281 ('*AB's Case*'); *EF v KL* (2024) 113 SR (WA) 324 ('*GH's Case*'); *HM and the Co-ordinating Practitioner for HM* [2024] WASAT 23 ('*HM's Case*'); *BMR v Co-ordinating Practitioner for MTH* (2024) 114 SR (WA) 257 ('*MTH's Case*'); *NP v QR* (2024) 115 SR (WA) 309 ('*NP's Case*').

in Victoria.[2] Six of those seven cases have involved the requirement that a person be ordinarily resident in the state for at least 12 months before applying to access VAD.[3] This article analyses the impact of legislative state residence requirements, in light of the case law, on patient access to VAD.

To be eligible for VAD in the Australian states[4] or the Australian Capital Territory ('ACT'),[5] a person must be an adult, have a terminal illness (an advanced, progressive condition which is expected to cause death within the specified timeframe), have decision-making capacity, and make a free and voluntary request. In addition to these requirements, a person must meet two eligibility criteria relating to residence. The first is that the person must be an Australian citizen or permanent resident.[6] This criterion was included to prevent what has been termed 'death tourism' or 'suicide tourism'[7] – that is, to prevent people from other countries where assisted dying is unlawful travelling to Australia to access VAD. The second criterion is that the person must be 'ordinarily resident' in the relevant state for at least 12 months before applying for VAD.[8] This criterion was intended to prevent residents travelling to states where VAD had been legalised to access VAD.[9]

This article focuses on the 12 month state residency requirements, which have proved difficult for persons seeking VAD in practice.[10] Apart from the cases that

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2 *NTJ v NTJ* [2020] VCAT 547 ('*BTR's Case*'); *YSB v YSB* [2020] VCAT 1396 ('*UQL's Case*').

3 *AB's Case* (n 1); *BTR's Case* (n 2); *GH's Case* (n 1); *HM's Case* (n 1); *MTH's Case* (n 1); *NP's Case* (n 1).

4 *Voluntary Assisted Dying Act 2022* (NSW) ('*NSW VAD Act*'); *Voluntary Assisted Dying Act 2021* (Qld) ('*Qld VAD Act*'); *Voluntary Assisted Dying Act 2021* (SA) ('*SA VAD Act*'); *End-of-Life-Choices* (*Voluntary Assisted Dying) Act 2021* (Tas) ('*Tas EOLC Act*'); *Voluntary Assisted Dying Act 2017* (Vic) ('*Vic VAD Act*'); *Voluntary Assisted Dying Act 2019* (WA) ('*WA VAD Act*').

5 The ACT has recently passed the *Voluntary Assisted Dying Act 2024* (ACT) ('*ACT VAD Act*'), but this will not come into effect until 3 November 2025.

6 In some states, the legislative criterion is more flexible and includes those who have been residents of Australia for at least three years but have not formally become citizens or permanent residents: *NSW VAD Act* (n 4) s 16(1)(b)(iii); *Qld VAD Act* (n 4) s 10(1)(e)(iii); *Tas EOLC Act* (n 4) s 11(1)(a)(iii). Additionally, in Queensland, a person can apply for exemption from this criterion: *Qld VAD Act* (n 4) s 12(1)(a). The *ACT VAD Act* (n 5) does not require Australian citizenship or permanent residence as a criterion of eligibility.

7 Sascha Callaghan, 'Death Tourism' (2011) 107 *Precedent* 34, 36–7; Saskia Gauthier et al, 'Suicide Tourism: A Pilot Study on the Swiss Phenomenon' (2015) 41(8) *Journal of Medical Ethics* 611, 611 <https://doi.org/ doi:10.1136/medethics-2014-102091>.

8 *NSW VAD Act* (n 4) s 16(1)(c); *Qld VAD Act* (n 4) s 10(1)(f); *SA VAD Act* (n 4) s 26(1)(b)(iii); *Tas EOLC Act* (n 4) s 11(1)(b); *Vic VAD Act* (n 4) ss 9(1)(b)(ii)–(iii); *WA VAD Act* (n 4) s 16(1)(b)(ii). *ACT VAD Act* (n 5) s 11(1)(f)(i) does not use the 'ordinarily resident' requirement but requires that the person has 'lived in the ACT for at least the previous 12 months'.

9 *AB's Case* (n 1) 287 [27] (Pritchard J); *GH's Case* (n 1) 329 [33]–[34] (Judge Jackson). See also Ben P White et al, 'Does the *Voluntary Assisted Dying Act 2017* (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417 <https://doi.org/10.53637/QEQJ5610> ('Does the *VAD Act* Reflect Its Goals?').

10 The seventh case unsuccessfully sought review of the citizenship or permanent residence criterion: *UQL's Case* (n 2) [5] (Quigley J). The Victorian Civil and Administrative Tribunal concluded that it lacked jurisdiction to determine the matter. Issues concerning the interpretation of this criterion have been analysed in Katrine Del Villar, Lindy Willmott and Ben P White, 'The Exclusion of Long-Term Australian Residents from Access to Voluntary Assisted Dying: A Critique of the "Permanent Resident" Eligibility Criterion' (2023) 49(2) *Monash University Law Review* 249 <https://doi.org/10.2139/ssrn.4576199>.

proceeded to tribunal litigation, it is not clear what number of people are impacted by this requirement in most states.[11] However, we anticipate that it is not an insignificant number. For example, in Queensland, where it is possible to seek an exemption from the residency requirements, in the first 18 months of operations (ie, 1 January 2023 – 1 June 2024), there were 35 exemptions granted for state residency.[12] This suggests there is a cohort of people seeking access to VAD who are unable to demonstrate state residency. While the analysis that follows centres on Victoria and WA – the only two states where the issue has been litigated to date – this article has implications for all Australian states, and the ACT when its law commences in 2025.[13]

In Part II, we briefly outline the six tribunal cases (one from Victoria and five from WA) which have reviewed decisions concerning the state residence criterion.[14] Part III then details the burden this imposes on patients, health professionals and the VAD system, which has implications for the policy goal of providing timely access to VAD. Part IV articulates some of the policy reasons for the state residence criterion of eligibility, and queries whether these policy objectives are being achieved, in the light of the outcomes of some of the decided cases. Part V then sets out calls for reform of the state residence criterion, and Part VI concludes with suggested models that this reform could take.

II WHO IS 'ORDINARILY RESIDENT' IN A STATE?

In every state except Tasmania, one of the eligibility criteria to access VAD is that at the time of making a first request for VAD, a person must have been 'ordinarily resident' in the state for 'at least 12 months'.[15] The criterion is formulated slightly differently in Tasmania, where the legislation requires a person to have been 'ordinarily resident in Tasmania for at least 12 *continuous* months immediately before' making a first request.[16] The *Voluntary Assisted Dying Act 2024* (ACT) ('*ACT VAD Act*') did not adopt the wording of 'ordinarily resident'

11 In WA, two applicants were declared ineligible on the ground of state residence: Voluntary Assisted Dying Board Western Australia, *Annual Report 2023–24* (Report, 2024) 20. Although statistics are available in Victoria indicating 77 out of 2,769 applicants have been assessed as ineligible for VAD at the first assessment, no breakdown is available as to the grounds of ineligibility: Voluntary Assisted Dying Review Board, *Voluntary Assisted Dying Review Board Annual Report: July 2023 to June 2024* (Report, September 2024) 8. Accordingly, in most states, it is not possible to determine how many other persons have been denied access to VAD on residency grounds but did not seek tribunal review.

12 Email from Sally Stubbington, Voluntary Assisted Dying Unit, Queensland Health to Katrine Del Villar, 18 July 2024.

13 *ACT VAD Act* (n 5).

14 Administrative tribunals in four Australian states, as well as the Supreme Court of New South Wales and the Voluntary Assisted Dying Commission in Tasmania, have jurisdiction to review decisions on certain eligibility criteria for VAD: *NSW VAD Act* (n 4) s 109(1); *Qld VAD Act* (n 4) ss 99, 102; *SA VAD Act* (n 4) s 85(1); *Tas EOLC Act* (n 4) s 95(1); *Vic VAD Act* (n 4) s 68(1); *WA VAD Act* (n 4) s 84(1).

15 *NSW VAD Act* (n 4) s 16(1)(c); *Qld VAD Act* (n 4) s 10(1)(f)(i); *SA VAD Act* (n 4) s 26(1)(b); *Vic VAD Act* (n 4) ss 9(1)(b)(ii)–(iii); *WA VAD Act* (n 4) s 16(1)(b)(ii).

16 *Tas EOLC Act* (n 4) s 11(1)(b) (emphasis added).

and simply states that a person must 'have lived in the ACT for at least the previous 12 months'.[17] As will be seen below, these minor differences in wording will have significant ramifications for access for some persons seeking VAD.

Queensland and New South Wales ('NSW') permit a person to apply for an exemption from the state residence requirement if a person has a 'substantial connection' to the state.[18] These laws provide examples of who might have a substantial connection, including a resident in a border community who works or receives medical treatment in a neighbouring state; a person who has family members in the state and has moved there to be closer to them for care and support; and a returning resident with family in the state.[19] The recently enacted *ACT VAD Act* will also allow persons who do not meet the 12 month residency requirement to apply for an exemption if they have a 'substantial connection' to the territory.[20] Examples of persons who would fall within this exemption include: a resident in a border community who works or receives medical treatment in a neighbouring state; a person who has family members in the state and has moved there to be closer to them for care and support; or a returning resident with family in the state; Aboriginal or Torres Strait Islander persons wishing to die on Country; and new residents who received their diagnosis after moving to the ACT.[21] While not an exemption to the residency requirements, the *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) ('*Tas EOLC Act*') enables a medical practitioner to seek advice from the Voluntary Assisted Dying Commission ('VAD Commission') about whether a person meets the residency requirements.[22] This approach, unique to Tasmania, may alleviate some of the burden placed on medical practitioners to determine this legal criterion.

The phrase 'ordinarily resident' used in all state VAD laws is not defined in any of those laws.[23] While in many cases residence is self-evident, issues arise when dealing with those whose working patterns are irregular, such as fly-in fly-out workers, flight crews or shipping crews. It also becomes complex for some persons, particularly in the latter years of their lives, who are no longer working and thus may choose to travel frequently, live a nomadic lifestyle, or spend extended periods of time living in other states or countries. The six cases examined in this article exemplify the challenges in applying the 'ordinarily resident' criterion to these circumstances.

A Nomadic Lifestyle: *BTR's Case*

There has been one case in Victoria concerning a man who had difficulty demonstrating he was 'ordinarily resident' in Victoria. *NTJ v NTJ* ('*BTR's Case*')

17 *ACT VAD Act* (n 5) s 11(1)(f)(i).
18 *NSW VAD Act* (n 4) ss 17(1)–(2)(a); *Qld VAD Act* (n 4) ss 10(1)(f)(ii), 12(2)(a).
19 *NSW VAD Act* (n 4) s 17(2)(a); *Qld VAD Act* (n 4) s 12(2)(a).
20 *ACT VAD Act* (n 5) ss 11(1)(f)(ii), 154(1).
21 Ibid s 154(1).
22 *Tas EOLC Act* (n 4) s 11(2).
23 The *Tas EOLC Act* (n 4) s 11(5) includes examples of evidence of ordinary residence including: a person's driver's licence; enrolment to vote; ownership of or lease of property in Tasmania or another state or territory.

involved a man referred to as BTR, who was born in Victoria and for the last 14 years of his life had been living in a caravan parked on property owned by friends in Victoria.[24] He travelled regularly interstate on fishing trips, spending long periods of time away, particularly in Queensland during the colder months.[25] He was in Queensland when he was diagnosed with incurable cancer and immediately returned to Victoria to be close to friends and family.[26] Less than three weeks after returning to Victoria, he made a request for VAD.[27] BTR's doctor, Dr NTJ, initially determined BTR had been 'ordinarily resident in Victoria' for at least 12 months and assessed him as eligible for VAD.[28]

Over the next three weeks, Safer Care Victoria, the government department responsible for administering the VAD legislation in Victoria, made four requests for further information concerning BTR's residence.[29] Despite becoming an inpatient in hospital during that period, BTR, in support of his application, provided copies of his driver's licence; passport; medical letters and records; Centrelink income statement; and various vehicle and vessel registration certificates as evidence that he had a Victorian residential address.[30] He made a statutory declaration concerning his residence,[31] the VAD Navigator at the hospital where BTR was an inpatient made a statement,[32] and the hospital responded to a list of questions from Safer Care Victoria,[33] but these were insufficient to satisfy Safer Care Victoria's requests for further information.[34]

Eventually Dr NTJ made an application to the Victorian Civil and Administrative Tribunal ('VCAT') for determination of the issue.[35] Quigley J concluded that, despite his frequent absences for extended periods, BTR was 'ordinarily resident' in Victoria and therefore was eligible for VAD.[36] She opined that not having a fixed address does not prevent a person being 'ordinarily resident' in a state.[37] Continuous physical presence is not a requirement for a person to be 'ordinarily resident'. Temporary absences are permissible provided they are not too 'prolonged'.[38] VCAT concluded that residence was 'a matter of fact and degree' which depends on circumstances, including where a person regularly or customarily lives and the person's subjective intention.[39]

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24 *BTR's Case* (n 2) [49] (Quigley J).
25 Ibid [49], [54]–[55].
26 Ibid [56].
27 Ibid [59].
28 Ibid [47].
29 Ibid [48], [50], [53], [58].
30 Ibid [47], [51], [57].
31 Ibid [49].
32 Ibid [54]–[56].
33 Ibid [58]–[59].
34 Ibid [59].
35 Ibid [60].
36 Ibid [87], [91].
37 Ibid [84].
38 Ibid [77], [83].
39 Ibid [83], [88].

B Family Interstate and Overseas: *AB's Case*

Nearly four years after *BTR's Case* in February 2024, the Western Australian State Administrative Tribunal ('WASAT') was called on to decide the first of what would become a string of five cases concerning the state residence requirement. *AB v CD* ('*AB's Case*') involved a 67-year-old man with lung cancer and brain metastases ('AB') who sought access to VAD.[40] Although AB had been born in NSW, he had been living and working in WA for around 30 years, until 2021.[41] AB did not own property in WA, but owned a run-down property in NSW which he was renovating and stayed at when he visited family in that state.[42] AB also had a romantic partner and son in Cambodia whom he visited periodically, but not for any substantial length of time.[43] After being diagnosed with lung cancer in December 2019, AB sought to arrange his affairs.[44] He lived in NSW for about 18 months on and off, completing the renovations and eventually selling his property there.[45] He also made two trips of a few months each to Cambodia to visit his Cambodian family, and visits to friends in WA.[46] He finally returned to WA in September 2023. Soon after he found accommodation at a palliative care provider,[47] and made a first request for VAD.[48] His doctor denied his request, considering him ineligible as he had spent little time in WA in the preceding 12 months.[49]

AB did not apply for review of his doctor's decision for over three months, because of his poor health and his lack of information as to his review rights.[50] Eventually, his friend assisted him to apply to the WASAT for review.[51] Pritchard J held that AB was 'ordinarily resident' in WA.[52] There was no doubt that AB was ordinarily resident in WA from 1991 to 2021.[53] Despite his physical absence from WA for much of 2022 and 2023, Pritchard J concluded the periods of time spent in NSW and Cambodia were temporary 'and for a specific purpose', being to renovate and sell his property to provide funds for his Cambodian family.[54]

Pritchard J adopted the test articulated by Quigley J in *BTR's Case*[55] and concluded that 'ordinarily resident' is 'a matter of fact and degree'.[56] Physical presence in the state is not required (although 'sufficiently prolonged' absences

40 *AB's Case* (n 1) 282 [1] (Pritchard J).
41 Ibid 291 [44]–[45].
42 Ibid 292 [51]–[52].
43 Ibid 292 [53].
44 Ibid 292 [54], 293 [58].
45 Ibid 293 [60].
46 Ibid 293 [60], [62].
47 Ibid 293 [62], [64].
48 Ibid 293 [68].
49 Ibid 283 [2]–[3].
50 Ibid 283 [4].
51 Ibid.
52 Ibid 295 [75].
53 Ibid 294 [69].
54 Ibid 294 [70].
55 *BTR's Case* (n 2) [77] (Quigley J).
56 *AB's Case* (n 1) 290–1 [37] (Pritchard J).

might rupture the residence connection).[57] What is significant is where a person regularly or customarily lives with some element of permanence, rather than where a person lives temporarily.[58] In this case, AB maintained a bank account, driver's licence and skipper's ticket in WA, his personal effects were in storage in WA, and it was apparent that his time in NSW and Cambodia was temporary to visit family.[59] AB's subjective belief that WA was his home, as evidenced by his many close friendships and supports there, was also a relevant factor.[60] This case demonstrates that in determining whether a person is 'ordinarily resident' in a state, the period of 12 months immediately preceding the first request is not the only period that must be taken into account – evidence from before that period is also relevant.[61]

C Living in Bali: *GH's Case*

Like *AB's Case*, the case of *EF v KL* ('*GH's Case*')[62] also involved a man who was absent from WA for long periods of time but considered WA his home. GH was an 83-year-old man who was almost blind from glaucoma and had recently been diagnosed with laryngeal cancer.[63] Originally from the Netherlands, he had emigrated to WA aged 18 and lived in Perth with his wife and family for over 40 years.[64] After his marriage ended in 2007, he had divided his time between Bali and Perth.[65] GH generally spent more time living in Bali, where it was cheaper to live on his pension than in Perth, but returned to Perth to visit his daughters and seek healthcare.[66] COVID-19 related travel restrictions meant he lived continuously in Bali from early 2020 until January 2023.[67] In February 2024, GH returned from Bali, was diagnosed with a malignant tumour of the larynx and a tracheostomy was performed, after which GH required assistance to breathe, eat and drink.[68]

A couple of weeks after his surgery, GH made a first request for VAD.[69] His coordinating practitioner, Dr KL, initially assessed him as ineligible, because he had not been 'ordinarily resident' in WA for 12 months prior to requesting VAD.[70] His daughters EF and IJ assisted him to seek review of this decision by the WASAT.[71]

Judge Jackson found that, despite spending more time in Bali than Perth over the previous 17 years, GH was nevertheless 'ordinarily resident' in WA.[72] He maintained a physical connection to WA, demonstrated by maintaining possessions

57 Ibid 289–90 [36], quoting *BTR's Case* (n 2) [77] (Quigley J).
58 *AB's Case* (n 1) 289–90 [36] (Pritchard J), quoting *BTR's Case* (n 2) [77] (Quigley J).
59 *AB's Case* (n 1) 294 [70]–[71] (Pritchard J).
60 Ibid 291 [41], 292 [48], 293 [67], 295 [73].
61 Ibid 295 [74].
62 *GH's Case* (n 1).
63 Ibid 325 [1]–[2] (Judge Jackson).
64 Ibid 331 [44]–[45].
65 Ibid 325 [1].
66 Ibid 331–2 [50]–[56].
67 Ibid 332–3 [59].
68 Ibid 325 [2], 333 [60]–[61].
69 Ibid 325 [2].
70 Ibid.
71 Ibid 326 [3].
72 Ibid 326 [4], 335 [84].

in his daughter's home in Perth; administrative ties to the state associated with banking, Medicare, Centrelink;[73] and, 'most critically', the fact that all his healthcare needs have been met by the same practitioners in WA over a period of decades.[74] Another critical consideration was GH's emotional connection to WA – his entire 'support network' of family (including daughters and grandchildren) and friends was there,[75] and his evidence was that he always considered his 'home' to be WA and that he was a guest in Bali.[76] This combination of factors meant that GH was not 'a tourist with a home elsewhere but was, rather, someone who has come home to die peacefully with his family'.[77] Therefore, Judge Jackson concluded that GH was eligible for VAD.[78]

D Moving to Tasmania: *HM's Case*

In contrast to *AB's Case* and *GH's Case*, two more recent cases resulted in former residents of WA being denied access to VAD. *HM and the Co-ordinating Practitioner for HM* ('*HM's Case*')[79] involved a 69-year-old woman who had been a long-term resident of WA from 1980 before moving to Tasmania with her husband upon retirement in 2014.[80] She returned to WA regularly once or twice a year to visit family and on one of those visits, in October 2023, was diagnosed with incurable lung cancer.[81] Since her diagnosis, HM had remained in WA and commenced chemotherapy, followed by radiation therapy.[82] Ultimately, her illness progressed and HM requested VAD on 13 March 2024.[83] She was assessed as ineligible by her coordinating practitioner, on the basis that she was not ordinarily resident in WA.[84]

HM applied to the WASAT for review of the coordinating practitioner's decision.[85] Judge Vernon applied the same principles first articulated in *BTR's Case* and confirmed to be applicable in WA in *AB's Case* and *GH's Case*.[86] However, she distinguished those cases, concluding that after 2014, HM was not 'ordinarily resident' in WA.[87] In contrast to the applicants in *AB's Case* and *GH's Case*, she considered HM had severed her physical and administrative connections to WA.[88] In particular, she had sold her property in the state and bought property in

73 Ibid 334 [72].
74 Ibid 334 [75].
75 Ibid 334 [68].
76 Ibid 333 [67].
77 Ibid 335 [81].
78 Ibid 335 [84].
79 *HM's Case* (n 1).
80 Ibid [26]–[28] (Judge Vernon).
81 Ibid [67].
82 Ibid [67]–[71].
83 Ibid [2].
84 Ibid [3].
85 Ibid [6].
86 Ibid [16]; *BTR's Case* (n 2) [77] (Quigley J); *AB's Case* (n 1) 289–90 [36] (Pritchard J); *GH's Case* (n 1) 335 [78]–[80] (Judge Jackson).
87 *HM's Case* (n 1) [11] (Judge Vernon).
88 Ibid [108]–[110].

Tasmania;[89] she had obtained and held a Tasmanian driver's licence; her Tasmanian property was noted as her place of residence for tax purposes; and her doctor was in Tasmania.[90] Although HM returned regularly to WA, this was only for short visits of two to three weeks.[91]

There was evidence that HM remained emotionally attached to WA, considered herself to be a Western Australian, and in 2022 had begun preparations to renovate and sell her Tasmanian property prior to an eventual return to WA in the future.[92] Despite this emotional connection to WA, Judge Vernon concluded that on the totality of the evidence, HM had been ordinarily resident in Tasmania since 2014, as that is where her property and almost all her possessions were.[93] It could not be said that the periods of time spent in Tasmania could be characterised as extended holidays (as in *BTR's Case*), or were of a temporary nature or for defined purposes (as they were in *AB's Case*).[94]

E No Fixed Address: *MTH's Case*

The fourth case was *BMR v Co-ordinating Practitioner for MTH* ('*MTH's Case*').[95] MTH, a 70-year-old man of no fixed address, travelled regularly between WA and Victoria (and sometimes Queensland) for work.[96] He had a room for his sole use in his sister's house in Victoria, as well as a room in his niece's house in WA, and appeared to spend periods of a few months at a time with both each year.[97] In 2019, while living in Victoria with his sister, he was diagnosed with myeloma.[98] He engaged in treatment in Victoria, including chemotherapy and participating in a clinical trial in 2023.[99] On 14 February 2024, after being excluded from the clinical trial, MTH returned to WA.[100]

MTH made his first request for VAD on 15 April 2024 and was assessed as ineligible on the ground that he was not ordinarily resident in the state.[101] It was argued that MTH was ordinarily resident in both Victoria and WA, as he had a room of his own in his relatives' homes and possessions in both states.[102] It was argued that he was prevented from continuing to be resident in both states by COVID-19 travel restrictions,[103] and then by the clinical trial which was not available in WA.

Judge Vernon accepted that MTH had a strong emotional connection to WA. He spent roughly half his life in WA, he considered himself to be a Western Australian,

89 Ibid [95].
90 Ibid [89].
91 Ibid [42].
92 Ibid [52]–[60], [77], [79].
93 Ibid [89].
94 Ibid [109].
95 *MTH's Case* (n 1).
96 Ibid 265 [49]–[53] (Judge Vernon).
97 Ibid 267 [69]–[70].
98 Ibid 267 [71]–[72].
99 Ibid 268 [80]–[82].
100 Ibid 268 [83]–[85].
101 Ibid 259 [2]–[3].
102 Ibid 267 [69]–[70].
103 Ibid 269 [94].

and 'he thinks of Fremantle as home, because it was the place where, as a child, he was secure, safe and loved'.[104] Despite this, she considered he had not been 'ordinarily resident' in WA for at least 12 months.[105] The concept of 'resident' has two elements: physical presence, and an intention to treat the place as 'home'. It cannot be based solely on intention.[106] Although he had been ordinarily resident in the state at certain times in his life, this was not the case for the period prior to February 2024. His administrative ties (ie, bank accounts, Centrelink, Medicare and electoral records) were not in WA prior to that time;[107] and significantly, unlike in *GH's Case*, he had received medical treatment and participated in a clinical trial outside the state.[108]

F Extended Holiday: *NP's Case*

The most recent case was *NP v QR* ('*NP's Case*').[109] NP, a man in his early 70s, was born overseas but lived in WA for forty years, working and raising his family there.[110] In mid 2021, NP and his wife sold their home, stored their possessions and bought a caravan to embark on the 'holiday of a lifetime' around Australia.[111] This was interrupted in January 2022, when they travelled to Adelaide to provide urgent help to NP's youngest son.[112] Their initial plan was to stay in South Australia ('SA') for the year before continuing their travels,[113] and to return to WA permanently in 2024.[114] For financial reasons, NP and his wife sold their caravan and bought a residence in a lifestyle village in SA.[115] NP had also obtained a South Australian driver's licence.[116]

NP lived in SA for over two years, returning home to Perth only a couple of times for short periods.[117] In April 2024, NP was diagnosed with pancreatic cancer in SA and returned immediately to WA.[118] NP made a first request for VAD to Dr QR on 6 July 2024,[119] but was assessed as ineligible because he had not been 'ordinarily resident' in WA for at least 12 months prior to making his first request.[120]

Glancy J decided that NP was ordinarily resident in WA, setting aside Dr QR's decision.[121] She characterised NP's trip as an 'extended holiday', stating

104 Ibid 270 [98].
105 Ibid 272 [122].
106 Ibid 263 [29], quoting *Federal Commissioner of Taxation v Addy* (2020) 280 FCR 46, 66 [74] (Derrington J, Steward J agreeing).
107 *MTH's Case* (n 1) 269 [88] (Judge Vernon).
108 Ibid 271 [109]–[111].
109 *NP's Case* (n 1).
110 Ibid 310 [1], 315 [43]–[44] (Glancy J).
111 Ibid 315–16 [49].
112 Ibid 316 [52].
113 Ibid 316 [52]–[53].
114 Ibid 315–16 [49]–[50].
115 Ibid 316 [53].
116 Ibid 315 [44].
117 Ibid 315 [47], 316 [54].
118 Ibid 316 [55].
119 Ibid 310 [1].
120 Ibid 310 [2], 317 [62].
121 Ibid 317 [57], [62].

that NP never intended to make anywhere other than WA his home.[122] Glancy J distinguished *HM's Case* on the basis that NP, unlike HM, always had an intention to return home at a 'relatively specific point in time', despite this time point being delayed.[123] She reasoned that most indicia pointed towards NP being 'ordinarily resident' in WA, where he maintained a physical and emotional connection, even though NP had a South Australian driver's licence and despite the purchase of a residence in SA.[124]

G Summary

The different results in these cases highlight the difficulty of applying the criterion of 'ordinarily resident' in the state for at least 12 months prior to requesting VAD. In the six cases outlined above, four applicants were ultimately found eligible to access VAD and two were not. One clear theme from these cases is how complex it can be to determine whether or not a person is 'ordinarily resident' in a state. 'Resident' has been consistently described in the case law as a 'question of fact and degree': that is, it depends on the totality of the circumstances, including physical connection, administrative ties and emotional connection.[125] Ultimately, this is a complex legal test. Yet it is medical practitioners, acting as coordinating and consulting practitioners, who must bear the burden of determining whether applicants meet this eligibility criterion. This may point to the value of the provision in the *Tas EOLC Act* which enables a medical practitioner to seek advice on this point from the VAD Commission.[126]

The cases also shed light on the factors that will guide decisions about whether a person will be judged to be 'ordinarily resident' in a state. One factor is physical presence in the state. While this is obviously a consideration in favour of being 'ordinarily resident' and a fact that would be relatively easy for medical practitioners to substantiate, physical presence is not necessarily determinative and people who live elsewhere for periods may still be able to meet this criterion. In *GH's Case*, the applicant had been living in Bali for the majority of the past 17 years but was not considered to be 'resident' there. Similarly, AB had been in NSW or Cambodia for most of the two years prior to his request for VAD, but he was nevertheless considered to be 'ordinarily resident' in WA. Further, NP had been travelling outside WA for approximately two and a half years, even purchasing property in SA, but was found to be 'ordinarily resident' in WA. In contrast, HM had spent the previous six months in WA but was considered to be 'ordinarily resident' in Tasmania, where she had lived for nine years prior to that. The cases also demonstrate difficulties assessing the residency status of persons with no fixed address or nomadic lifestyles, as evidenced by the opposing outcomes reached in *BTR's Case* and *NP's Case* compared to *MTH's Case*.

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122 Ibid 317 [58].
123 Ibid 317 [58]–[59].
124 Ibid 317 [61].
125 *BTR's Case* (n 2) [83] (Quigley J); *AB's Case* (n 1) 290–1 [37] (Pritchard J); *MTH's Case* (n 1) 262–3 [25] (Judge Vernon); *HM's Case* (n 1) [16] (Judge Vernon).
126 *Tas EOLC Act* (n 4) s 11(2).

Significant weight seems to have been placed in all the decided cases on administrative documentation such as a driver's licence, voter registration, and the address provided to Centrelink or Medicare.[127] While a driver's licence is relatively easy for applicants to produce, other documentation may be more time-consuming to obtain, particularly bearing in mind patients are suffering from a terminal illness.[128]

Another highly significant factor appears to have been the state where the person ordinarily receives medical treatment. This accords with one of the principles underpinning the VAD laws: namely, supporting and maintaining the therapeutic relationship between a person and their health practitioner where possible.[129] In some cases, where the person chose to receive medical treatment confirmed their residence status. For example, when GH's daughters raised concerns about his health and urged him to seek treatment in Bali, he instead decided to return home to WA, whereupon he was immediately admitted to hospital and operated on. Similarly, when BTR was diagnosed with cancer in Queensland, he immediately made plans to return to Victoria for treatment where his support network was. In both cases, this confirmed that the person's home and ordinary place of residence was the state where they had longstanding relationships with family and friends, and medical practitioners. By contrast, in *MTH's Case*, the fact that he underwent chemotherapy and a clinical trial in Victoria for a couple of years before eventually moving back to WA suggested to the Tribunal that MTH was resident in Victoria, not WA.

This factor, however, can be difficult to apply in practice. For example, AB received chemotherapy and radiation therapy in WA and also received cancer treatment in NSW before returning to WA for palliative care and VAD. The Tribunal did not consider that this precluded AB from being considered ordinarily resident in WA. The result in *HM's Case* is most curious in this regard – she was diagnosed with cancer in WA and all her treatment occurred in that state, yet one of the factors described as significant in determining that she was ultimately resident in Tasmania, not WA, was the fact that she had a regular general practitioner in Tasmania. It is difficult to see why this factor was more significant than the fact she had an ongoing therapeutic relationship with her cancer team in WA.

Another factor, which was not mentioned in any tribunal decisions but may have shaped deliberations, is whether VAD was available in the other jurisdiction the applicant had lived in. For example, it was undisputed that MTH would have been eligible for VAD in Victoria, having lived there since 2019 (partially due to COVID-19 restrictions preventing him travelling to Perth, partially due to his illness). HM would also likely be considered ordinarily resident in Tasmania, where

127 *BTR's Case* (n 2) [47], [85] (Quigley J); *AB's Case* (n 1) 292 [49], 294 [70] (Pritchard J); *MTH's Case* (n 1) 265 [48], 269 [88]–[89] (Judge Vernon); *GH's Case* (n 1) 334 [72] (Judge Jackson); *HM's Case* (n 1) [38], [89] (Judge Vernon); *NP's Case* (n 1) 315 [44], 316 [53] (Glancy J).

128 Lindy Willmott et al, 'Participating Doctors' Perspectives on the Regulation of Voluntary Assisted Dying in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia* 125, 127 <https://doi.org/10.5694/mja2.51123> ('Doctors' Perspectives').

129 *NSW VAD Act* (n 4) s 4(1); *Qld VAD Act* (n 4) s 5; *SA VAD Act* (n 4) s 8; *Tas EOLC Act* (n 4) s 5; *Vic VAD Act* (n 4) s 5; *WA VAD Act* (n 4) s 4(1). See also *AB's Case* (n 1) 287 [28] (Pritchard J); *GH's Case* (n 1) 329–30 [35] (Judge Jackson).

VAD is a legal option and would have been eligible for VAD had she returned to Tasmania promptly after being diagnosed with cancer.[130] This is very different from the situation, for example, of GH returning from Bali where VAD is not legal, or BTR returning to Victoria in 2020 at a time when it was the only Australian state where VAD laws were operational.[131]

III CHALLENGES OF THE STATE RESIDENCE REQUIREMENT

The cases above highlight some of the issues which arise in practice with a requirement for patients to be 'ordinarily resident in a state for at least 12 months' as part of the eligibility criteria for VAD. This Part now looks beyond these cases and identifies the range of practical impacts of the state residence requirement on people seeking VAD, not only in relation to the tribunal review process, but also more broadly in relation to the VAD request and assessment process.

A Compiling Evidence for the VAD Request and Assessment Process

Due to the multifactorial nature of the 'ordinarily resident' test and the variation in individuals' circumstances, there is no single form of documentation which is universally accepted to prove a person has been ordinarily resident in a state for at least 12 months. Therefore, it may require considerable administrative effort by persons seeking VAD to gather the necessary paperwork for the assessing practitioner during the VAD request and assessment process. In *BTR's Case*, Safer Care Victoria requested copies of the applicant's driver's licence, car, boat, caravan and trailer registration, and Medicare and Centrelink records as evidence that he had a Victorian residential address.[132] They also sought formal statements from the applicant, the VAD Navigator at the hospital where he was receiving treatment, and the hospital itself.[133] All of this evidence was required at the first assessment stage in order to be satisfied the person was ordinarily resident in Victoria. An additional challenge is that some people with terminal illness throw out their paperwork as they are preparing for death and so may be unable to provide the necessary documentary evidence, or it may cause delays to find and compile such evidence.[134] To illustrate, an empirical study of doctors' participation in VAD in Victoria reported this observation from an assessing practitioner:

130 Note, however, that by the time HM made her request for VAD in WA in March 2024, she had not been 'ordinarily resident in Tasmania for at least 12 *continuous* months immediately before' (emphasis added) the request and would probably no longer have been eligible in Tasmania. The operation of the *Tas EOLC Act* (n 4) is discussed further below.

131 Eliana Close et al, 'Voluntary Assisted Dying and Telehealth: Commonwealth Carriage Service Laws Are Putting Clinicians at Risk' (2021) 215(9) *Medical Journal of Australia* 406, 407 <https://doi.org/10.5694/mja2.51287>.

132 *BTR's Case* (n 2) [47], [51], [57] (Quigley J).

133 Ibid [49], [54]–[56], [59].

134 Willmott et al, 'Doctors' Perspectives' (n 128) 127, app.

> I remember saying to someone 'Now, I need your rates bills or your rental bill from 12 months ago to prove you've been a resident of Victoria for 12 months'. She looked at me as if I'm some blithering idiot and said 'I'm going to be dead in two months' time. I've thrown out all my paperwork. What the f*** do you mean I've got to keep paperwork like that from 12 months ago?', and she had a point.[135]

B Lack of Knowledge of Review Rights

A person assessed as not eligible for VAD on the basis of state residency may not be aware of relevant review mechanisms. This is not a hypothetical concern. In *AB's Case*, there was a delay of over three months before he sought a review of the decision that he was not ordinarily resident in WA. This delay occurred because AB was unaware of his right to seek review, and due to his ill health, needed assistance from his friend to prepare the review documents.[136] This lack of awareness has implications for access to justice,[137] particularly as the decision that a person was ineligible for VAD was overturned in three of the five Western Australian cases.

C Burden of Completing Application for Review

Litigation is always challenging, but these challenges are magnified for terminally ill people, who by definition are the cohort who may need to seek this review. In the six cases analysed above, all the individuals concerned had advanced cancer and in some cases, their ill health was exacerbated by invasive treatments such as chemotherapy and radiation therapy. The cases record that some applicants would have been unable to make the application for tribunal review without assistance. For example, in *AB's Case*, it was noted that AB needed assistance to prepare the application because of his 'precarious health'.[138] Similarly, in *GH's Case*, the process of obtaining GH's witness statement was described as being 'slow, difficult, and exhausting' for GH,[139] and the need for assistance due to his ill health was reiterated.[140]

D Compiling Evidence for Tribunal Review

Review before an administrative tribunal is a comprehensive process, requiring detailed compilation of evidence. This will generally be more exhaustive than the evidence already compiled for the request and assessment process, which was already described as challenging above. The tribunals have generally sought to piece

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135 Ibid app.

136 *AB's Case* (n 1) 283 [4] (Pritchard J).

137 Enforcing legal rights at the end of one's life depends on knowledge of end-of-life law, which is often lacking: see Cheryl Tilse et al, 'Community Knowledge of Law on End-of-Life Decision-Making: An Australian Telephone Survey' (2019) 27(2) *Journal of Law and Medicine* 399; Lindy Willmott et al, 'Role of Law in End-of-Life Decision-Making: Perspectives of Patients, Substitute Decision-Makers and Families' (2021) 28(3) *Journal of Law and Medicine* 813 <https://doi.org/10.2139/ssrn.3909636>.

138 *AB's Case* (n 1) 283 [4] (Pritchard J). See also *MTH's Case*, where he was described as 'very gravely ill': *MTH's Case* (n 1) 264–5 [37] (Judge Vernon).

139 *GH's Case* (n 1) 328 [25] (Judge Jackson).

140 Ibid 327–8 [16], 328 [25].

together how long a person lived in a particular place, not just over the last year or two, but over the course of their entire lives. In *MTH's Case*, the judge noted that the statements referred to 'events [which] occurred a considerable period of time ago'.[141] For people in their 70s and 80s, this may require marshalling a considerable amount of information, particularly if they have moved around a lot. As described in Part II, the tribunals have generally required evidence of where a person's car or other vehicle registrations are maintained, electoral registration, Centrelink address, Medicare address, and other administrative requirements. In *HM's Case*, the tribunal went through details of the applicant's bank accounts and corresponding branch addresses back to the 1980s.[142] This is a considerable amount of detail to be gathered at a time when a person is at the very end of their life and very unwell. Further, given the passage of time and the stress of a terminal illness, inaccuracies can occur, which can affect the outcome of the review process. In *MTH's Case*, despite acknowledging that witnesses were giving evidence concerning events which occurred long ago, the judge stated that differences between witness statements 'undermine the reliability of that evidence to some extent'.[143]

E Cost of Tribunal Review

Yet another challenge for patients is the cost of tribunal review. Although there are no filing fees in Victoria or WA to apply for review of a decision on eligibility, there may be significant costs in terms of legal representation. Although the applicant doctor in the Victorian *BTR's Case* appeared in person, in all the Western Australian cases, the applicant was legally represented.[144] Senior Counsel were involved in two of these cases, due to the complexity of the issues.[145]

F Time

A further, possibly most significant, challenge is the time taken to establish state residency. The time required to assemble evidence of state residence for the initial VAD request and assessment process has already been noted. Even without tribunal review, this can take some time, particularly if there are requests for further information from monitoring agencies. In *BTR's Case*, requests for information went back and forth over three weeks after the patient's first VAD assessment.[146]

Additionally, where tribunal review is required, this takes further time. Time is spent engaging lawyers, preparing witness statements and attending hearings – all time which could be spent with the dying person's family and friends. Although the tribunal process is expedited and timeframes from application to hearing are rapid

141 *MTH's Case* (n 1) 264–5 [37] (Judge Vernon).
142 *HM's Case* (n 1) [31]–[32] (Judge Vernon).
143 *MTH's Case* (n 1) 264–5 [37] (Judge Vernon).
144 By Ms R Young SC in *AB's Case* (n 1) and *GH's Case* (n 1), Ms B Tariq in *HM's Case* (n 1), Mr P Doukas in *MTH's Case* (n 1), and Mr T Pontre in *NP's Case* (n 1).
145 *AB's Case* (n 1) 284 [11] (Pritchard J); *GH's Case* (n 1) 326 [8] (Judge Jackson). Note that in *AB's Case* the Tribunal deliberately sought pro bono representation for the applicant, because it was the first case in which the *WA VAD Act* (n 4) was being considered by the WASAT: *AB's Case* (n 1) 284 [11] (Pritchard J).
146 27 March 2020 to 17 April 2020: *BTR's Case* (n 2) [46]–[59] (Quigley J).

compared to other legal proceedings, a delay of 5 to 22 days (as outlined in Table 1) is nevertheless significant for people with terminal illness, when every day is significant.[147] It is also worth noting that a person would not have completed the VAD request and assessment process at the date of the tribunal decision – this is simply determining the outcome of the first step of the VAD request and assessment process. Patients would still need to be approved by at least one other medical practitioner, make a written request, and decide how the medication would be administered, amongst other steps, before they could actually obtain access to VAD.[148]

Table 1: Time Taken for Tribunal Review of State Residence Requirements

Case	First Request	First Assessment	Application to Tribunal	Date of Tribunal Decision	Time from Tribunal Application to Decision	Time from First Assessment to Tribunal Decision
BTR's Case	27 March 2020	27–30 March 2020	17 April 2020	22 April 2020	5 days	23–26 days
AB's Case	13 October 2023	19 October 2023	2 February 2024	12 February 2024	10 days	116 days
GH's Case	22 February 2024	22 February 2024	23 February 2024	1 March 2024	7 days	8 days
HM's Case	13 March 2024	13 March 2024	19 March 2024	5 April 2024	17 days	23 days
MTH's Case	15 April 2024	15 April 2024	1 May 2024	7 May 2024	6 days	22 days
NP's Case	6 July 2024	8 July 2024	18 July 2024	9 August 2024	22 days	32 days

The tribunal review process also creates administrative burdens and has time costs for other participants in the VAD system. It takes time for medical practitioners to research and understand complex requirements such as 'ordinarily resident', which are not part of usual medical practice but are nevertheless eligibility criteria they must evaluate and assess. In cases where the person has not been physically present in the jurisdiction for most of the preceding 12 months, medical practitioners will need to familiarise themselves with the case law discussed above

147 Ben P White et al, 'Access to Voluntary Assisted Dying in Victoria: A Qualitative Study of Family Caregivers' Perceptions of Barriers and Facilitators' (2023) 219(5) *Medical Journal of Australia* 211, 212 <https://doi.org/10.5694/mja2.52004>.

148 The median timeframe from first request to death is 24 days in WA: Voluntary Assisted Dying Board Western Australia, *Annual Report 2022–23* (Report, 2023) 34 ('*WA Board Report 2022–23*'). In Victoria, the median timeframe from first request to dispensing the medication is 34 days: Voluntary Assisted Dying Review Board, *Annual Report: July 2022 to June 2023* (Report, June 2023) 16 (*'Vic Board Report 2022–23*').

and seek to understand all the relevant factors in terms of physical presence in the state, administrative ties and emotional connection, before making a decision.

G Distress and Hardship

Finally, the cumulative effect of the evidentiary burden, the cost of engaging and briefing counsel, the stress of being involved in legal proceedings, and the time review processes take, causes distress and hardship to the patient, their family and others. As was noted in *MTH's Case* in relation to tribunal review, it 'has clearly added to the distress of an already very distressing time in [the patient and their family's] lives'.[149] This wider impact is significant as family support from a spouse,[150] children,[151] sibling[152] or friend[153] was crucial in all cases, as was the support of the person's coordinating practitioner.

IV POLICY REASONS FOR THE STATE RESIDENCE REQUIREMENT

This Part identifies, and then critically examines, the intended policy reasons for the state residence requirement. These are primarily to prevent VAD tourism and to ensure VAD occurs in the context of high quality end-of-life care within a therapeutic relationship with a local medical practitioner. We critique the state residence criterion against these goals, noting it can impede the achievement of these policy objectives. Further, we contest the ongoing need for such a requirement now that VAD is lawful in almost all Australian jurisdictions.

In both Victoria and WA, it was explicitly noted that the primary reason for introducing the 'ordinarily resident' requirement was to prevent people travelling to the state temporarily for the purpose of accessing VAD,[154] a phenomenon described by the Australian Medical Association as 'voluntary assisted dying tourism'.[155] All

149 *MTH's Case* (n 1) 263–4 [31] (Judge Vernon).

150 *HM's Case* (n 1).

151 GH's children EF and IJ were co-applicants in his tribunal review application and acted as his 'support network': *GH's Case* (n 1) 327–8 [16] (Judge Jackson).

152 MTH's sister, CJG, and niece, BMR, were co-applicants in his tribunal review application. They were both named as substitute decision-makers in his enduring power of attorney, and provided him with care, support and advocacy: *MTH's Case* (n 1) 260 [7], 261 [18] (Judge Vernon).

153 In *AB's Case*, his best friend Ms S was integral to him being able to bring the application: *AB's Case* (n 1) 283 [4] (Pritchard J).

154 Department of Health and Human Services (Vic), *Ministerial Advisory Panel on Voluntary Assisted Dying* (Final Report, July 2017) 56; Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices* (Final Report, 9 June 2016) 221; Department of Health (WA), *Ministerial Expert Panel on Voluntary Assisted Dying* (Final Report, 27 June 2019) 20 ('*WA Panel Report*').

155 *WA Panel Report* (n 154) 20, quoting the submission of the Australian Medical Association. For a more detailed discussion of this legislative purpose, see Katrine Del Villar and Amelia Simpson, 'Voluntary Assisted Dying for (Some) Residents Only: Have States Infringed s 117 of the *Constitution*?' (2022) 45(3) *Melbourne University Law Review* 996, 1016–19; White et al, 'Does the *VAD Act* Reflect Its Goals?' (n 9) 435–6.

the decided cases have expressly referred to this legislative purpose.[156] In *AB's Case*, Pritchard J also noted that this restriction was necessary because people may wish to travel interstate to access VAD where VAD was not available to them in their home state.[157] As one of the authors has suggested elsewhere, the desire to prevent VAD tourism is likely to be underpinned by concerns to protect the state's health system from the burden on healthcare practitioners and resources which may be caused by an influx of out of state residents.[158]

The prevention of VAD tourism is less important now that all Australian states and the ACT have legislated for VAD, with residents less likely to move state simply to access VAD. However, retaining the 'ordinarily resident' restriction has the unfortunate consequence of precluding former long-term residents of a state returning home to die surrounded by family and friends. This can be seen from the outcomes in *HM's Case* and *MTH's Case.* In both cases, the person may have been eligible for VAD in another Australian state (Tasmania and Victoria, respectively). They were not in WA because of the lack of VAD laws in their current state, but because they wished to die in the place they considered home, surrounded by family and their support network.[159] In *MTH's Case*, Judge Vernon observed:

> Mr MTH also points out that he was eligible to access voluntary assisted dying in Victoria and had chosen to come home to Western Australia to die with his family, expecting that he would be eligible because he has spent large parts of his life in this State. Both Ms BMR and Ms CJG say that they do not understand why Mr MTH, who considers himself to be a Western Australian, '*has to fight so hard to access something that he had access to in Victoria*'. Ms BMR points out that Mr MTH cannot be regarded as a '*medico-tourist*'.[160]

Similarly, in *HM's Case*, Judge Vernon also commented that HM had a longstanding association with the state, considers herself a Western Australian and was not the type of person intended to be excluded from accessing VAD in WA (ie, a VAD tourist).[161]

The second relevant policy reason for the state residence requirement is to provide VAD in the context of high quality end-of-life care by supporting and maintaining a therapeutic relationship with a local medical practitioner.[162] In some of the decided cases, the presiding tribunal member noted that the state residence requirement furthers this legislative purpose by preventing people who do not have a therapeutic relationship in the state from accessing VAD.[163] While this may be

156 *BTR's Case* (n 2) [72] (Quigley J); *AB's Case* (n 1) 287 [27] (Pritchard J); *GH's Case* (n 1) 329 [33]–[34] (Judge Jackson), quoting *AB's Case* (n 1) 287 [27] (Pritchard J); *HM's Case* (n 1) [84] (Judge Vernon), quoting *AB's Case* (n 1) 287 [27] (Pritchard J); *MTH's Case* (n 1) 270 [96] (Judge Vernon), quoting *AB's Case* (n 1) 287 [27] (Pritchard J); *NP's Case* (n 1) 314 [34]–[35] (Glancy J), quoting *AB's Case* (n 1) 287 [27] (Pritchard J).

157 *AB's Case* (n 1) 287 [28] (Pritchard J).

158 Del Villar and Simpson (n 155) 1024.

159 *HM's Case* (n 1) [82] (Judge Vernon).

160 *MTH's Case* (n 1) 263–4 [31] (Judge Vernon) (emphasis in original).

161 *HM's Case* (n 1) [86]–[87] (Judge Vernon).

162 See Victoria, *Parliamentary Debates*, Legislative Assembly, 19 October 2017, 2948 (Jill Hennessy, Minister for Health), cited in Del Villar and Simpson (n 155) 1023–4.

163 *BTR's Case* (n 2) [71]–[72] (Quigley J); *AB's Case* (n 1) 287 [28] (Pritchard J); *GH's Case* (n 1) 329–30 [35] (Judge Jackson).

true, there will also be circumstances where it will hinder the achievement of this legislative objective. A case in point is *HM's Case*. After becoming unwell and receiving a cancer diagnosis while on a trip to visit family in WA, HM remained in WA a further six months and 'all her medical treatment for that cancer … occurred [in WA]'.[164] Yet, although she had existing relationships with a number of medical professionals in WA when she applied for VAD, her application was refused on the basis that she was not 'ordinarily resident in Western Australia'.[165] This result seems at odds with the legislative purpose of HM receiving VAD in the context of therapeutic relationships.

As such, the emphasis on the policy objective of an ongoing therapeutic relationship with local medical practitioners may also work against other policy principles – in particular, promoting high quality care and treatment as opposed to genuine choices at the end-of-life.[166] As the outcome in *MTH's Case* demonstrates,[167] if a person being in a current therapeutic relationship within the state is considered an important indicator of being 'ordinarily resident', in some situations this may force the person to choose between receiving top quality healthcare in another state and meeting the eligibility criteria for VAD in their home state. Although in *AB's Case* being 'absent from the State to obtain access to medical treatment not available in this State' did not affect AB's residence status,[168] in *MTH's Case*, the choice to stay in Victoria to participate in a clinical trial of cancer treatment was a significant factor in the conclusion that MTH was not 'ordinarily resident' in WA.[169] The focus on the therapeutic relationship rather than high quality care and treatment hampers genuine choice at the end-of-life.

The state residence requirement will also work against achieving the policy objective of accessing VAD within an existing therapeutic relationship for residents of border towns or regions.[170] Such issues have already occurred in the United States ('US'), where a constitutional challenge was brought by a resident of Washington state living close to the Oregon border, who wished to receive assistance to die from his Oregon-based practitioner, rather than a practitioner in his home state. Although the claim in *Gideonse v Brown* was settled when the government in Oregon agreed not to enforce the residence requirement,[171] this situation illustrates that the state residence requirement will cause issues for a small number of patients with relationships with medical professionals across state borders.

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164 *HM's Case* (n 1) [86] (Judge Vernon).

165 *WA VAD Act* (n 4) s 16(1)(b)(ii).

166 These principles were expressly referred to by the tribunal in *AB's Case* (n 1) 287 [28] (Pritchard J).

167 *MTH's Case* (n 1) 271 [111]–[112] (Judge Vernon).

168 *AB's Case* (n 1) 287–8 [29] (Pritchard J).

169 *MTH's Case* (n 1) 271 [111]–[112], 271–2 [116]–[117], 272 [121] (Judge Vernon).

170 This was recognised by the Queensland Law Reform Commission ('QLRC') in its report: Queensland Law Reform Commission, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 160–1 [7.456]–[7.459] ('*QLRC Report*').

171 Nicholas Gideonse, 'Complaint for Declaratory and Injunctive Relief', Pleading in *Gideonse v Brown* (3:21-cv-1568, 28 October 2021); 'Settlement Agreement and Release of Claims', Settlement in *Gideonse v Brown* (3:21-cv1568, 28 March 2022) 2.

V CALLS FOR REFORM

There have been growing calls for change to the state residency criterion from VAD Boards, advocacy groups and academics.[172] The Victorian Voluntary Assisted Dying Review Board has suggested the state residency requirements and access to VAD across borders be reconsidered,[173] and has recognised that the state residency requirement can be difficult to meet, particularly for people who travel around Australia for long periods (such as the applicants in *BTR's Case* or *MTH's Case*).[174] The Voluntary Assisted Dying Board Western Australia ('WA VAD Board') has also observed the exclusionary effect this has on those who want to relocate to WA to be closer to family or social supports at the end of their life (such as in *GH's Case*, *HM's Case* and *MTH's Case*).[175]

It has been argued that the documentation requirements to demonstrate 'ordinarily resident' place an unnecessary burden on people at a time when they are often extremely unwell.[176] Further, the state residency requirement excludes Australians from accessing VAD not because they are not suffering a terminal illness, but purely on the basis of their living arrangements. In submissions to the five year review of the operation of Victoria's *VAD Act*, advocacy organisations Dying With Dignity Victoria and Go Gentle Australia called for the state residency criterion to be removed,[177] as did the Australian and New Zealand community of VAD practitioners.[178] This restriction has been described as 'an unnecessary hurdle and barrier to access'[179] now that VAD laws are operational in all Australian states, with the ACT to follow in November 2025. The declining utility of this criterion once other Australian jurisdictions have introduced VAD regimes was also recognised by the Queensland Law Reform Commission, prior to the enactment of Queensland's VAD law.[180]

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172 See, eg, Aidan Ricciardo, 'Voluntary Assisted Dying and State Residence Requirements: A Western Australian Perspective' (2024) 51(2) *University of Western Australia Law Review* 146, 170–2.

173 *Vic Board Report 2022–23* (n 148) 32; Voluntary Assisted Dying Review Board, *Report of Operations July 2021 to June 2022* (Report, June 2022) 31.

174 Voluntary Assisted Dying Review Board, *Report of Operations January–June 2020* (Report, August 2020) 15.

175 *WA Board Report 2022–23* (n 148) 4, 54.

176 Dying with Dignity Victoria, Submission to Centre for Evaluation and Research Evidence, Department of Health (Vic), *Review of the Operation of Victoria's Voluntary Assisted Dying Act 2017* (February 2024) 7 ('*Dying with Dignity Submission*').

177 Ibid; Go Gentle Australia, Submission to Centre for Evaluation and Research Evidence, Department of Health (Vic), *Review of the Operation of Victoria's Voluntary Assisted Dying Act 2017* (February 2024) 4 ('*Go Gentle Submission*'); John Hont, 'Victoria: From Leader to Laggard in Voluntary Assisted Dying', *Dying with Dignity Victoria* (Web Page) <https://www.dwdv.org.au/other-resources/victoria-from-leader-to-laggard-in-voluntary-assisted-dying/>.

178 Voluntary Assisted Dying Australia and New Zealand, Submission to Centre for Evaluation and Research Evidence, Department of Health (Vic), *Review of the Operation of Victoria's Voluntary Assisted Dying Act 2017* (February 2024) 6.

179 Go Gentle Australia and Voluntary Assisted Dying Australia and New Zealand, *VADCON 2023* (Conference Report, 27–28 September 2023) 8.

180 *QLRC Report* (n 170) 165 [7.498], 168.

An alternative option for states like Victoria and WA is to introduce an exemption for persons who do not meet the 12 month state residency requirement but who have a substantial connection to the state. An exemption is currently available in Queensland, NSW and the ACT. The WA VAD Board in its *Annual Report 2022–23* recommended exemptions be available in two classes of cases: those with a substantial connection to WA, and those found eligible in another jurisdiction.[181] Advocacy organisations also support the availability of exemptions for residents of border communities and people relocating to be close to family at the end-of-life, if removing the state residency requirement altogether were not considered possible.[182]

Another reason for considering reform is that the 12 month state residence criterion is arguably unconstitutional on the basis that it infringes section 117 of the *Australian Constitution.*[183] Section 117 prohibits laws discriminating against residents of different states. The 12 month state residence requirement in all Australian VAD laws is a textbook example of direct discrimination on the face of the law – a resident of another state is excluded from accessing VAD, while a resident of the state concerned is not. Section 117 of the *Australian Constitution* does not prohibit every instance of discrimination against out of state residents – discriminatory state laws may be constitutional if they are necessary for and proportionate to a legitimate purpose.[184] While it may previously have been arguable that excluding residents of other states was necessary to ensure a state's health system was not unduly overburdened by out of state residents, healthcare resource considerations can no longer be considered a legitimate purpose for such discrimination now that all states have operational VAD laws. Further, the discriminatory impact of the 12 month state residence criterion on new residents of the state has never been justifiable for a legitimate purpose and, in that respect, the state residence requirement has always contravened section 117.[185]

VI SUGGESTED MODELS FOR REFORM

The current state residence requirements are no longer fit for purpose. Now that VAD is legal in seven of eight Australian jurisdictions, the policy goal of preventing VAD tourism assumes considerably less significance. The fiscal and healthcare resource implications of providing VAD to a small number of out of state residents (ie, those with a nomadic lifestyle as in *BTR's Case*, *MTH's Case* or *NP's Case*, or returning former residents as in *GH's Case* and *HM's Case*) will be marginal in the context of the scheme overall. Any potential resource implications would also arguably be offset by no longer requiring doctors to spend time

181 *WA Board Report 2022–23* (n 148) 54.

182 *Dying with Dignity Submission* (n 176) 20; *Go Gentle Submission* (n 177) 4.

183 Del Villar and Simpson (n 155). The QLRC also recognised that the state residence requirement might infringe section 117: *QLRC Report* (n 170) 158–9 [7.442]–[7.448].

184 *Street v Queensland Bar Association* (1989) 168 CLR 461, 511 (Brennan J).

185 Del Villar and Simpson (n 155) 1044.

assessing state residency (which is a cost to the health system) or have tribunals adjudicate on this issue.

Furthermore, the law is ineffective in achieving its second purported policy goal of ensuring VAD is accessed in the context of an ongoing therapeutic relationship. As *HM's Case* demonstrates, in some cases the state residence requirement has the opposite effect – excluding a person who has been undergoing cancer treatments in the state for six months from receiving assisted dying from their treating practitioners.

Rather than achieving these legislative purposes, the state residence criterion imposes a significant administrative burden on terminally ill people by requiring them to provide detailed documentation to demonstrate their ordinary state of residence. It also requires medical practitioners to apply a highly discretionary multi-factorial legal test in determining whether a person is eligible to access VAD, which is particularly complex where the person has been living a nomadic lifestyle, has no fixed address or lives in a border community. Originally designed to prevent VAD tourists travelling from states without operative VAD laws, the state residence criterion now operates differently and can exclude former residents returning to their home state from accessing their chosen end-of-life options (as in *MTH's Case* or *HM's Case*).

Accordingly, we argue that reform of the state residence criterion is needed in Australian VAD laws. There are three possible models which could be adopted to achieve this: an exemption to state residence, mutual recognition of similar schemes, and repeal of state residence requirements – our preferred approach.

A Retain State Residence Criterion but Permit Exemptions

The first model is that states could incorporate an exemption, similar to that currently contained in the VAD legislation in Queensland, NSW or the ACT, which allows persons with a 'substantial connection' to the state/territory to access VAD within the state/territory. The exemption would need to be framed broadly to encompass returning residents, new residents of a state who receive a terminal diagnosis, those with family or support networks within the state, and those with a nomadic or fly-in fly-out lifestyle.

This option has the advantage of medical practitioners no longer being required to determine what is essentially an administrative criterion of eligibility in complex cases. Where there is uncertainty about a person's eligibility due to frequent moving or lengthy periods interstate, a decision on eligibility could be made by seeking a bureaucratic exemption. This option also involves the least amount of legislative change, which may be politically appealing.

However, a drawback of such an approach is that it retains the state residency requirement, which, as has been demonstrated, is not justifiable in light of the policy goals of the VAD legislation. Even in routine cases, demonstrating residency still requires patients, families and doctors to go through the process of locating and assessing relevant documentation, imposing a considerable time and cost burden on them. As noted above, this is not part of the skill set or training of doctors.

In addition, significant doubts remain as to the constitutionality of this model. It retains the current state residence requirement which explicitly discriminates against

out of state residents and is arguably in violation of section 117 of the *Australian Constitution*. As demonstrated in Part V, there is unlikely to be a legitimate reason for excluding out of state residents now that most Australian jurisdictions have legalised VAD. Further, this model involves additional administrative processes as the exemption documentation is prepared and approval is sought. This inevitably involves stress and delays, which are undesirable when terminally ill people are seeking assistance in dying.

B Mutual Recognition

The second model, which may be adopted independently or with the first option, is to insert a legislative provision permitting access to VAD in the state if they would have been eligible in another state or territory with similar legislation. There is precedent for mutual recognition in a number of areas of state law, including recognition of advance directives made under laws in other states.[186]

This option may seem an attractive way to address the problems experienced in cases such as *HM's Case* or *MTH's Case*. However, it would not be effective to address the situation which arose in *GH's Case*, as GH was living in Bali, which does not have VAD laws. Therefore, this solution is partial at best, as it would not solve the difficulties experienced by returning Australian citizens and residents from jurisdictions without analogous VAD laws.

A further difficulty with this approach is that the differing language used in the VAD legislation across states may cause unexpected technical lacunae. The facts of *HM's Case* illustrate one of these gaps. HM had been resident in Tasmania for nine years before her visit to WA, where she received her terminal diagnosis.[187] However, the state residence criterion under Tasmania's VAD legislation requires that the person has been 'ordinarily resident in Tasmania for at least 12 *continuous* months immediately before' making a first request.[188] As HM had been living in WA and receiving cancer treatment there for approximately six months before making a VAD request, she likely would not have been eligible for VAD in Tasmania, were she in a physical condition to return there, as her period of residence in WA would break the continuity of her longer period of Tasmanian residence. A mutual recognition provision would therefore not assist a person in HM's position.

Another reason for caution about mutual recognition as a solution to this problem is that, while state and territory laws in Australia currently contain similar eligibility requirements, there is a possibility that some states may later amend their laws to apply to a broader class of persons. For example, the ACT legislation is explicitly required to be reviewed three years after it commences. This requires consideration of whether VAD should be permitted for individuals who do not meet the state residence requirement and are not eligible for an exemption,

186 See, eg, *Powers of Attorney Act 1988* (Qld) s 40; *Advance Care Directives Act 2013* (SA) s 33; *Guardianship and Administration Act 1995* (Tas) s 35ZN(3); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 95; *Guardianship and Administration Act 1990* (WA) s 110ZA.

187 *HM's Case* (n 1) [86], [95] (Judge Vernon).

188 *Tas EOLC Act* (n 4) s 11(1)(b) (emphasis added).

children with decision-making capacity through advance directive.[189] Similarly, the mandatory legislative review in Queensland in 2026 is expressly required to consider the eligibility criteria.[190] The outcomes of these reviews could create significant differences between Australian jurisdictions as to who is eligible for VAD, which could lessen the desirability of mutual recognition of eligibility for VAD from a policy perspective.

Further, while current Australian VAD eligibility criteria are similar, they are not the same.[191] For mutual recognition to work, this would potentially require assessing doctors to be aware of eligibility criteria of Australian jurisdictions beyond their home state or territory. This would add a range of complexity and challenges for the VAD system, including potentially requiring mandatory training for health practitioners assessing and providing VAD to address the eligibility criteria across all Australian jurisdictions.

C Repeal the State Residence Criterion

The final option, our preferred option, is to repeal the state residence criterion now that all states and the ACT have passed VAD laws. This has the advantage of both legal and practical simplicity. It removes an eligibility criterion which no longer serves its intended purpose, and which patients, families and doctors find burdensome. However, the Australian citizen or permanent resident criterion of eligibility will continue to ensure that Australia is not subject to an influx of VAD tourists from other countries, as has been the case in Switzerland.[192] In addition, removing the state residence requirement will support a coordinated national approach to VAD. This option has the advantage of removing the constitutional difficulties with section 117 of the *Australian Constitution*, as described in Part V above.

This model is also consonant with VAD practice internationally. Although many countries where VAD is legal require a person to be a citizen, permanent or long-term resident of that country to access VAD,[193] no other jurisdiction has adopted the 12 month minimum residence requirement imposed in each of the

189 *ACT VAD Act* (n 5) s 162.

190 *Qld VAD Act* (n 4) s 154(2).

191 Katherine Waller et al, 'Voluntary Assisted Dying in Australia: A Comparative and Critical Analysis of State Laws' (2023) 46(4) *University of New South Wales Law Journal* 1421, 1434–5, 1466.

192 See, eg, Callaghan (n 7); Gauthier et al (n 7). The authors note that in the ACT there is no 'Australian citizen or permanent resident' criterion of eligibility. If the ACT state residence criterion were to be removed, there is a potential for influxes of international VAD tourists. If the ACT wished to prevent this, it would need to insert an Australian citizenship or residence criterion.

193 See *End of Life Choice Act 2019* (NZ) s 5(1)(b); *Reglamento para la Aplicación de la Eutanasia Activa Voluntaria y Avoluntaria en Ecuador* [Regulations for the Application of Active Voluntary and Involuntary Euthanasia in Ecuador] (Ecuador) 12 April 2024, No 00059-2024, art 4(a), (b); *Ley Orgánica 3/2021, de 24 de Marzo, de Regulación de la Eutanasia 2021* [Organic Law 3/2021 of March 24 for the Regulation of Euthanasia] (Spain) art 5(1)(a); *Gesamte Rechtsvorschrift für Sterbeverfügungsgesetz* [Complete Legislation for Death Directives Act] (Austria) BGBl I, 242/2021, § 1(2); *Diário da República* [Official Gazette of the Union] (Portugal) No 101, Series I of 25 May 2023, Law No 22/2023, art 3(2) (16 May 2023). For more detail, see Katrine Del Villar, Lindy Willmott and Ben P White, 'Voluntary Assisted Dying: Australia in an International Context' (2025) *Medical Law Review* (forthcoming).

Australian states. This leaves citizens and permanent residents of those countries free to return to their home country to access VAD if they are diagnosed with a serious and incurable illness while living abroad. As *GH's Case*, *HM's Case* and *MTH's Case* demonstrate, this is much more difficult in Australia due to the additional 12 month state residence requirement. The US is the only country where, like Australia, VAD laws differ between states.[194] Unlike Australia, only 12 jurisdictions out of a possible 50 to date permit VAD, so there is much more genuine scope for VAD tourism in the US. Most US states or districts which permit VAD expressly require a person to be a resident of that state or district in order to be eligible.[195] However, they do not require a minimum period of residency, so US citizens regularly move to a state which has legalised VAD in order to access the procedure there.[196] Some US states, such as Vermont and Oregon, have repealed their residency requirement[197] for constitutional reasons. The move to repeal residency requirements in some US states sends a particularly strong signal of the problematic nature of these requirements, given the increased likelihood of significant numbers of out of state VAD applicants in the US.

VII CONCLUSION

The current state residence requirement is no longer fit for purpose. It is not effective to ensure VAD occurs in the context of a therapeutic relationship with medical practitioners within a state, and there is no longer any significant need to prevent VAD tourists coming from other states. The case law discussed above demonstrates that what was originally intended as a safeguard for hospitals and health systems has become a stumbling block for those Australians who are living a peripatetic lifestyle, either for work reasons or in their retirement, as well as those who live apart from their family and support networks. As all states are

194 Spain, Canada and Austria are all federations, but their main assisted dying laws have been passed at the national level. There is a separate law at the provincial level in Quebec, Canada: *Act Respecting End-of-Life Care*, RSQ 2014, c S-32.0001.

195 *Oregon Death with Dignity Act*, Or Rev Stat §§ 127.805(1), 127.860 (1997); *Washington Death with Dignity Act*, Wash Rev Code §§ 70.245.040(1)(b), 70.245.130 (2008); *End of Life Option Act*, Cal Health and Safety Code § 443.2(3) (Deering, 2015); *Death with Dignity Act of 2016*, DC Code § 7-661 (2017); *End-of-Life Options Act*, Colo Rev Stat § 25-48-103(1) (2016); *Our Care, Our Choice Act*, Haw Rev Stat §§ 327L-2, 327L-13 (2018); *Medical Aid in Dying for the Terminally Ill Act*, NJ Stat Ann § 26:16-4(a) (West, 2019); *Maine Death with Dignity Act*, Me Rev Stat Ann § 2140.4 (2019); *Elizabeth Whitefield End-of-Life Options Act*, NM Stat § 24-7C-2(A) (2021); An Act to Amend Title 16 of the Delaware Code Relating to End of Life Options, HR 140, 153th Delaware General Assembly (2024).

196 See the high profile case of Brittany Maynard who moved from California to Oregon to access VAD: Del Villar and Simpson (n 155) 1035. See also Thaddeus Mason Pope, 'Medical Aid in Dying: Key Variations Among US State Laws' (2020) 14(1) *Journal of Health and Life Sciences Law* 25, 37–8 <https://doi.org/10.2139/ssrn.3743855>.

197 Vermont became the first state to remove its residency requirement on 2 May 2023: An Act Relating to Removing the Residency Requirement from Vermont's Patient Choice at End of Life Laws, HR 190, General Assembly of the State of Vermont (2023). Oregon passed a bill repealing its residency requirement in June 2023: An Act Relating to Death with Dignity, HB 2279, 82nd Oregon Legislative Assembly (2023).

mandatorily required to review the operation of their VAD laws on a regular basis, there is an opportunity to address this. Indeed, Judge Vernon in *MTH's Case* expressly noted that the Western Australian legislative review provides an opportunity for Parliament to consider whether the legislation should be amended to allow Australians moving from interstate the opportunity to seek VAD in a place where they have the support of their family.[198] However, this issue does not need to wait for these mandatory reviews, which in some jurisdictions are some years away. Instead, given the problems identified, there is a case for action now. In this regard, we note recent reports that the Western Australian and Queensland governments were willing to consider reform on this issue.[199] We invite them, and the other Australian jurisdictions, to reflect on the problems highlighted by these recent Western Australian cases and amend their laws accordingly.

198 *MTH's Case* (n 1) 264 [33].

199 Keane Bourke, 'Voluntary Assisted Dying Almost Universally Available in Australia, but Residency Requirements Block Some from Accessing It', *ABC News* (online, 12 July 2024) <https://www.abc.net.au/news/2024-07-12/residency-requirements-blocking-access-to-vad/104050352>.