VOLUNTARY ASSISTED DYING AND STATE RESIDENCE REQUIREMENTS: A WESTERN AUSTRALIAN PERSPECTIVE

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In early 2024, the first three cases considering the *Voluntary Assisted Dying Act 2019* (WA) came before the Western Australian State Administrative Tribunal. All three cases relate to whether the applicants had been ordinarily resident in Western Australia for a period of at least 12 months — this being a requirement to be eligible for voluntary assisted dying under the Act. In the first two cases, the Tribunal found that the applicants satisfied that requirement despite considerable physical absences from Western Australia, including during the preceding 12 months. However, in the third case the Tribunal found that the applicant did not satisfy the requirement. This article provides an overview and analysis of these cases, as well as the residence criterion generally. Ultimately, this article concludes that whilst the Tribunal's decisions are sensible and sound, the relevant statutory requirement itself is in need of reform. Whilst this article focusses on the Western Australian Act, much of the analysis is also broadly applicable to the voluntary assisted dying legislation in other Australian states.

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I INTRODUCTION

The provisions of the *Voluntary Assisted Dying Act 2019* (WA) ('the *VAD Act*') that made voluntary assisted dying ('VAD') available to eligible people in Western Australia commenced in July 2021.[1] *AB and CD* [2024] WASAT 6 *('AB')*,[2] which was decided in February 2024, is the first time the *VAD Act* has been considered by any court or tribunal. Soon after, in March 2024, the *VAD Act* was considered again in *EF and KL* [2024] WASAT 18 *('EF')*.[3] Then in April 2024, *HM and The Co-ordinating Practitioner for HM* [2024] WASAT 23 *('HM')* also considered the *VAD Act*.[4] All three matters were heard in the Western Australian State Administrative Tribunal ('the Tribunal') — *AB* was decided by Justice Pritchard (President of the Tribunal), *EF* was decided by Judge Jackson and *HM* was decided by Judge Vernon (both Deputy Presidents of the Tribunal).

The issue in each case was whether the respective applicants could be regarded as ordinarily resident in Western Australia ('WA') for at least 12 months — that being a prerequisite to access VAD under the *VAD Act*.[5] For context, it is necessary to briefly outline the relevant legislative framework giving rise to *AB, EF* and *HM*.

The process to access VAD under the *VAD Act* begins with a patient's clear and unambiguous request for VAD.[6] That request, when made to a medical practitioner during a medical consultation, is called a 'first request'.[7] When presented with a first request, the medical practitioner must choose whether to refuse the request (eg, because the practitioner is unwilling or ineligible to coordinate the patient's VAD process)[8] or accept it.[9] If the practitioner accepts the first request they become known as the coordinating practitioner,[10] who must then make a 'first assessment' to determine whether the patient is eligible for VAD under the *VAD Act*.[11] The eligibility criteria for access to VAD are set out in s 16(1) of the *VAD Act* as follows:

> (1) The following criteria must be met for a person to be eligible for access to voluntary assisted dying —
>
> (a) the person has reached 18 years of age;
>
> (b) the person —

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[1] The *Voluntary Assisted Dying Act 2019* (WA) ('*VAD Act*') was passed by the Western Australian parliament and received royal assent in December 2019.

[2] *AB and CD* [2024] WASAT 6 ('*AB*').

[3] *EF and KL* [2024] WASAT 18 ('*EF*').

[4] *HM and The Co-ordinating Practitioner for HM* [2024] WASAT 23 ('*HM*').

[5] *VAD Act* (n 1) s 16(1)(b)(ii).

[6] Ibid s 18.

[7] Ibid s 5.

[8] Ibid ss 9, 20.

[9] Ibid s 20.

[10] Ibid ss 5, 23.

[11] Ibid s 24.

(i) is an Australian citizen or permanent resident; and
(ii) at the time of making a first request, has been ordinarily resident in Western Australia for a period of at least 12 months;

(c) the person is diagnosed with at least 1 disease, illness or medical condition that —
(i) is advanced, progressive and will cause death; and
(ii) will, on the balance of probabilities, cause death within a period of 6 months or, in the case of a disease, illness or medical condition that is neurodegenerative, within a period of 12 months; and
(iii) is causing suffering to the person that cannot be relieved in a manner that the person considers tolerable;

(d) the person has decision-making capacity in relation to voluntary assisted dying;
(e) the person is acting voluntarily and without coercion;
(f) the person's request for access to voluntary assisted dying is enduring.

In *AB, EF* and *HM*, the Tribunal was tasked with determining whether, at the time of making the first request, the respective applicants had been ordinarily resident in WA for a period of at least 12 months (as required by s 16(1)(b)(ii) of the *VAD Act*). In *AB* and *EF*, the Tribunal found that the applicants satisfied s 16(1)(b)(ii) (the 'residence criterion') despite considerable physical absences from WA, including during the 12-month period prior to their first requests. However, in *HM* the Tribunal found that the applicant did not satisfy the requirement.

With the exception of the Northern Territory (where medical assistance in dying was briefly legal in the 1990s),[12] Victoria became the first Australian jurisdiction to legalise VAD with the *Voluntary Assisted Dying Act 2017* (Vic). To access VAD under that Act, a person must have been ordinarily resident in Victoria for a period of at least 12 months preceding the request for VAD.[13] This requirement was included as part of the eligibility criteria to prevent a perceived risk of 'death tourism' — ie, people coming to the state only for the purpose of accessing VAD.[14] WA was the second Australian jurisdiction to legalise VAD, with WA's *VAD Act* closely resembling the Victorian law in many respects,[15] including in its adoption of the residence criterion.[16] Since WA passed the *VAD Act*, Tasmania, South Australia, Queensland and New South Wales have all passed their own VAD laws — all of which include an equivalent of the residence criterion.[17]

[12] *Rights of the Terminally Ill Act 1995* (NT); Katherine Waller et al, 'Voluntary Assisted Dying in Australia: A Comparative and Critical Analysis of State Laws' (2023) 46(4) *UNSW Law Journal* 1421, 1421.
[13] *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(b)(ii)–(iii).
[14] Victorian Ministerial Advisory Panel on Voluntary Assisted Dying, *Final Report* (Report, 21 July 2017) 54.
[15] See Waller et al (n 12) 1434, which notes that '[t]he eligibility criteria for all states closely resemble the criteria first enacted in Victoria.'
[16] *VAD Act* (n 1) s 16(1)(b)(ii).
[17] *Voluntary Assisted Dying Act 2022* (NSW) s 16(1)(c); *Voluntary Assisted Dying Act 2021* (Qld) s 10(1)(f)(i); *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(b) (ii)–(iii); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 11(1)(b).

A *Aims, Structure and Thesis of this Article*

This article explores *AB, EF* and *HM*, analysing the decisions themselves and the residence criterion more broadly. These cases are worthy of analysis for several reasons. First, they are of great interest because these are the first times the *VAD Act* has been judicially considered. Second, eligibility for VAD is an important issue — the eligibility criteria are 'arguably the most significant aspect of [VAD] laws, as they play a key role in controlling who will have access to VAD, and who should be excluded'[18] — the way these criteria are interpreted and applied matters. Third, because these cases all deal with the same issue, cross-case analysis can reveal valuable insights about this important issue. And finally, these cases provide an opportunity to reconsider whether the residence criterion in the *VAD Act* remains appropriate now that all Australian states have legislated broadly similar VAD frameworks.

This article canvasses *AB, EF* and *HM* in Part II. It closely explores the facts and findings because, as is evident from the cases, residence criterion assessments require close and careful consideration of the applicant's life and background. The analysis in this article is organised into three parts. Part III analyses the Tribunal's reasoning and decisions in *AB, EF* and *HM*. Part IV then considers whether, and in light of the three decisions, the residence criterion remains appropriate. Finally, Part V makes some relevant observations about first assessments under the *VAD Act*.

Ultimately, this article argues that although the decisions in *AB, EF* and *HM* are sensible and sound, the residence criterion itself is in need of reform — it is more restrictive than it needs to be to achieve its legislative purpose. Whilst this article focusses on the Western Australian *VAD Act*, most of the analysis is also broadly applicable to the VAD legislation in each other Australian state (which all have very similar eligibility criteria).[19]

II THE CASES

A *AB and CD [2024] WASAT 6*

The applicant, Mr AB, brought the matter to the Tribunal as an application for review of a decision made by Dr CD (Mr AB's coordinating practitioner).[20] The relevant decision was Dr CD's first assessment as to Mr AB's eligibility for VAD under

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[18] 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* 1, 43–4.
[19] Waller et al (n 12) 1434.
[20] See *VAD Act* (n 1) s 97, which sets out that in any review under the *VAD Act*, 'the Tribunal must ensure that the decision or reasons are published in a form that does not disclose personal information about… a party to the proceeding'.

the *VAD Act*. Relevantly, Dr CD's first assessment found that Mr AB was ineligible only because he had not, at the time of making the first request, been ordinarily resident in WA for a period of at least 12 months.[21] Ultimately, President Pritchard found that Mr AB met the residence criterion in s 16(1)(b)(ii) despite having spent little time in WA in the 12 month period prior to his first request.

1.1 *Factual Background*

Mr AB was 67 years old. He was initially diagnosed with lung cancer in 2019 and then with metastasis to his brain in 2022, at which point he was told that he had a life expectancy of about one year.[22] On 13 October 2023, he made a first request for VAD to Dr CD. On 19 October 2023, Dr CD conducted the first assessment and found that Mr AB met all of the eligibility requirements except for the residence criterion in s 16(1)(b)(ii).

President Pritchard noted that, when making the first assessment, Dr CD appeared to have minimal evidence available to her about where Mr AB had been ordinarily resident during the relevant period.[23] In a letter outlining the reasons for her decision, Dr CD said that she had received information from Mr AB's palliative care team that he had only recently moved to WA, and that notes from a hospital admission six weeks earlier set out that he had only recently arrived to stay with his friend, Ms S.[24]

Further evidence about Mr AB's background was provided to the Tribunal for the purposes of the review.[25] In addition to a bundle of relevant documents, the Tribunal received as evidence unchallenged witness statements from Mr AB and his best friend Ms S. That evidence showed that Mr AB was an Australian citizen who moved to WA from New South Wales in 1991.[26] He lived in a town in regional WA from roughly 1998, residing there in a house provided by his employer until April 2021.[27] Mr AB had a close and ongoing relationship with Ms S, who also lived in the town — their relationship was initially a romantic one, but over time that changed and they became best friends. Mr AB had many friends in, and connections to, that regional area of WA.[28]

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[21] As required by *VAD Act* (n 1) s 16(1)(b)(ii).
[22] *AB* (n 2) [1], [54].
[23] Ibid [39].
[24] Ibid [39]. President Pritchard noted that this was not a full summary of Dr CD's reasons.
[25] As noted at ibid [18], *State Administrative Tribunal Act 2004* (WA) s 27 enabled the Tribunal to take into account new material, whether or not it existed at the time Dr CD's decision was made, and whether or not it was before Dr CD at the time she made her decision.
[26] *AB* (n 2) [45].
[27] Ibid [46].
[28] Ibid [47]–[50], [66].

In 2007, Mr AB purchased a property in New South Wales that he could stay in whilst visiting family there, intending on renovating it as an investment. From 2007 to 2021, Mr AB would visit New South Wales and work on the property during those holidays.[29] Around 2010 or 2011, Mr AB became romantic partners with a woman in Cambodia, and they started a family together. He did not live in Cambodia for any substantial period of time.[30]

After being diagnosed with lung cancer in late 2019, Mr AB ultimately left his house and his job by April 2021 as he had run out of leave and was too unwell to continue working.[31] Mr AB decided to get his life affairs into order — he put his belongings into storage in WA and travelled to New South Wales to finish his renovations and sell the property, so he could give the proceeds to his Cambodian family.[32]

Mr AB lived at the New South Wales property while it was being renovated until November 2022. Between November 2022 and March 2023, he spent some time in New South Wales but also visited his friends in WA and his family in Cambodia during this time. He returned to New South Wales to sell the property, which sold in July 2023. He visited Cambodia in July 2023 but became too unwell to stay there and returned to WA in September 2023. It was always Mr AB's intention to return to WA after he sold the New South Wales property and said his final goodbye to his Cambodian family.[33]

In relation to Mr AB's subjective sense of identity and belonging, President Pritchard said that

> Mr AB regards Western Australia as his home, that it is where his heart is, and his heart is in regional Western Australia. He calls himself a Western Australian. He says he wants to die here. He wants to be buried in the same regional town in Western Australia where he lived for more than 20 years, and where he is now living in palliative care.[34]

1.2 *Review of the First Assessment*

As the application was made more than two months after the usual 28-day period within which a review must be commenced,[35] President Pritchard was first required to

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[29] Ibid [51].
[30] Ibid.
[31] Ibid [55]–[56].
[32] Ibid [58]–[62].
[33] Ibid [63]–[65].
[34] Ibid [67].
[35] *State Administrative Tribunal Rules 2004* (WA) r 9.

consider whether an extension of time should be granted. President Pritchard found that an extension should be granted because, considering that the delay was caused by matters including Mr AB's ill health and misinformation about his rights of review, it was in the interests of justice that the extension be granted.[36]

President Pritchard set out that there are three components to the residence criterion in s 16(1)(b)(ii) of the *VAD Act*:

> 1. Whether the criterion is met is to be judged as at the time the person made a first request…
> 2. The person seeking to access voluntary assisted dying must have been 'ordinarily resident in Western Australia' prior to making the first request; and
> 3. The person must have been ordinarily resident for a minimum time, namely a period of at least 12 months.[37]

President Pritchard identified the key question in the case as essentially one of statutory construction — the meaning of 'ordinarily resident' — requiring reference to the relevant text, context and purpose.[38] President Pritchard noted that the ordinary and natural meaning of the phrase 'directs attention to a person who usually or commonly or habitually dwells in, or has their settled or usual home in a particular place, in this case [WA].'[39] The phrase was said to import 'an element of permanence in relation to where the person makes their home.'[40]

Taking into account the context and surrounding phrases, President Pritchard opined that s 16's reference to 'a period of at least 12 months' contemplates a portion of time during which the person has been 'ordinarily resident', and the focus of attention should not *solely* be directed to the 12 month period prior to the first request.[41] President Pritchard also said that the singular reference to 'a' period means that the person 'must have been ordinarily resident for a discrete portion of their life, of at least 12 months' duration, rather than for periods of time which, taken together, might add up to at least 12 months.'[42]

Turning to the legislative purpose, President Pritchard noted that the intent was 'clearly' to exclude people who might come to WA — temporarily and briefly — only to access VAD:

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[36] *AB* (n 2) [4], citing ibid r 10.
[37] *AB* (n 2) [18].
[38] Ibid [19], citing *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2021] WASCA 208, [5] (Buss P and Murphy JA); *Mohammadi v Bethune* [2018] WASCA 98, [31].
[39] *AB* (n 2) [22].
[40] Ibid [22].
[41] Ibid [25].
[42] Ibid [26].

> the concern of the legislature was to confine access to voluntary assisted dying to persons living in Western Australia on a more permanent basis rather than to make it available to visitors who might come here solely to access voluntary assisted dying.[43]

Having considered the relevant text, context and purpose, President Pritchard elaborated on the proper meaning of 'ordinarily resident' in s 16(1)(b)(ii) of the *VAD Act*. Her honour said that the criterion demands particular attention be paid to where a person was a resident in the 12 months prior to the first request,[44] but it does not require a person to have been *present* in WA consistently during that period.[45] Thus, a person can still be ordinarily resident in WA even if they have been absent for a portion (or portions) of time in the period prior to making the first request, so long as WA 'remained the place where they had been ordinarily resident for at least 12 months'.[46]

President Pritchard noted that her construction of the phrase 'ordinarily resident' in the *VAD Act* was consistent with the meaning given to the same phrase in other legislation, including the similar criterion in s 9 of the *Voluntary Assisted Dying Act 2017* (Vic).[47] That provision was considered by the Victorian Civil and Administrative Tribunal in *NTJ v NTJ (Human Rights)* [2020] VCAT 547 ('*NTJ*'). President Pritchard adopted observations made by Justice Quigley in that case, summarising them as:

- Whether a person is 'ordinarily resident' in a State is a matter of fact and degree;
- The person may be resident without always being physically present;
- … '[O]rdinarily resident' requires something more than the mere fact of residing in a place. It requires a finding of where a person regularly or customarily lives as opposed to being temporarily resident…;
- To be ordinarily resident in a State does not preclude a person having more than one residence, such as having a home in that State and a holiday home in another State or country;
- The requirement does not amount to a requirement that the person have real property ownership or a fixed address. A person may be able to demonstrate that they are ordinarily resident in a State when they live in different locations, within that State or elsewhere, such as by evidence of a common or usual attachment to a place in the form, for example, of a driver's licence, car registration and insurance, Medicare or Centrelink registration and so on;

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[43] Ibid [27]. Some have referred to this phenomenon as 'death tourism' — see, eg, Sarah Steele and David Worswick, 'Destination Death: A Review of Australian Legal Regulation Around International Travel to End Life' (2013) 21 *Journal of Law and Medicine* 415, 416; Sascha Callaghan, 'Death Tourism' (2011) 107 *Precedent* 34, 35.
[44] *AB* (n 2) [29], [31].
[45] Ibid [29].
[46] Ibid [28].
[47] Ibid [34].

- A person's subjective opinion or intentions as to where or how they view themselves as 'ordinarily resident' are relevant; and
- Also relevant … will be whether the person has a long association with a State as a permanent resident, and who, despite absences, including lengthy absences, outside the State, regularly returns home to the State, and who has close connections to people in the State, such as family.[48]

Applying those principles to Mr AB's situation, President Pritchard found that Mr AB 'can properly be said to have been ordinarily resident in Western Australia for at least 12 months prior to the First Request on 13 October 2023.'[49] President Pritchard gave four reasons in support of that finding.

First, because Mr AB lived in WA on a permanent basis from 1991 to April 2021, he was undoubtedly ordinarily resident in WA over that period. He made his life and home in WA, forming strong bonds in the state. In September 2023, he returned to live in WA on what would 'clearly be a permanent basis, until his death'.[50]

Secondly, even though Mr AB was, for the most part, not physically present in WA between April 2021 and September 2023, that did not undermine the fact that he was ordinarily resident in WA between 1991 and the time of the first request. He maintained strong connections to WA during his physical absence (eg, his belongings were in storage in WA and he maintained his Western Australian driving licence etc). He only intended to spend time in New South Wales on a temporary basis and for a specific purpose, to renovate and sell the property.[51] Similarly, when he was in Cambodia it was to visit his family there one final time.[52] Therefore, President Pritchard found that Mr AB was not ordinarily resident anywhere other than WA while he was physically absent from the state. President Pritchard was, however, careful to clarify that a person might still be ordinarily resident in WA even if they are also ordinarily resident someplace else:

> I do not mean to suggest that in order to establish that a person is ordinarily resident in Western Australia, it is necessary to establish that they were not ordinarily resident anywhere else… [However, if] the person met the criteria for being ordinarily resident somewhere else, that may make it more difficult to establish that they were 'ordinarily resident' in Western Australia at the same time…[53]

[48] Ibid [37], citing *NTJ v NTJ (Human Rights)* [2020] VCAT 547, [83]–[88] ('*NTJ*').
[49] *AB* (n 2) [68].
[50] Ibid [69].
[51] Ibid [70].
[52] Ibid [71].
[53] Ibid [72].

President Pritchard's third reason was that Mr AB did, and continued to, regard WA as his home. His actions were also consistent with that subjective opinion.[54] And as a final reason, President Pritchard said that focussing *solely* on the 12 months prior to the first request (as Dr CD appeared to do) would not appreciate that s 16(1)(b)(ii) refers to the period of *at least* 12 months as merely the minimum required period: 'It is not the only period that one needs to have regard to.'[55]

For these reasons, President Pritchard set aside Dr CD's decision and instead substituted it for the 'correct and preferable' decision:[56] that Mr AB had, at the time of his first request on 13 October 2023, been ordinarily resident in WA for a period of at least 12 months.[57]

B *EF and KL [2024] WASAT 18*

The primary applicant in *EF* was Mr GH. His adult daughters, EF and IJ, were also applicants because Mr GH's health was such that he was unable to make the application without their assistance.[58] As in *AB*, *EF* was brought as an application for review of a first assessment by the coordinating practitioner. Mr GH's coordinating practitioner was Dr KL, who assessed Mr GH as meeting all but one of the requirements in s 16 of the *VAD Act*: Dr KL was not satisfied that Mr GH had then been ordinarily resident in WA for a period of at least 12 months.[59] Similarly to *AB*, Deputy President Jackson ultimately found that Mr GH did in fact satisfy the residence criterion even though he had spent very little time in WA since 2020.

2.1 *Factual Background*

Mr GH was 83 years old. He travelled from Bali to Perth on 5 February 2024 to seek urgent medical attention. Upon his arrival, he was taken right to hospital where he was diagnosed with laryngeal cancer. Mr GH underwent a tracheostomy, and was consequently unable to breathe, eat or drink without assistance.[60] He made his first request for VAD on 22 February 2022 and Dr KL conducted the first assessment that same day, concluding that Mr GH met all of the eligibility requirements except for the

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[54] Ibid [73].
[55] Ibid [74].
[56] See *State Administrative Tribunal Act 2004* (WA) s 27, which sets out that the purpose of the review is to produce the correct and preferable decision.
[57] *AB* (n 2) [76].
[58] *EF* (n 3) [25].
[59] As required by *VAD Act* (n 1) s 16(1)(b)(ii).
[60] *EF* (n 3) [2], [61].

residence criterion in s 16(1)(b)(ii).[61] The application for review was lodged by Mr GH and his daughters EF and IJ the following day.

Mr GH, EF and IJ each gave evidence. EF and IJ prepared witness statements and gave oral evidence at the hearing. Mr GH only gave evidence by a written witness statement which Deputy President Jackson described as 'necessarily brief' due to his health and associated fatigue. Deputy President Jackson noted that the evidence of all three witnesses was 'largely consistent' and allowed for the following findings of fact to be made.[62]

Mr GH was born in the Netherlands but moved to WA in 1959 when he was 18 years of age, remaining in the state until 1967. In 1967 he married and moved to Sydney, had his daughters (EF and IJ), then moved back to Perth in 1977.[63] Mr GH separated from his wife around 2007, an event which was the catalyst for his decision to spend a lot of time in Bali from that point onwards.[64] From about 2008 or 2009 until 2019, Mr GH spent a number of months per year in Bali — ultimately spending more time in Bali than in Perth over that period.[65]

When he returned to Perth from time to time, he would stay with his daughters 'often enough and for long enough to form a close relationship with his grandchildren'.[66] Importantly, despite spending more time in Bali, all of Mr GH's healthcare needs were always met in Perth — eg, he had an ongoing relationship with both an ophthalmologist and a general practice in Perth.[67] Mr GH also remained an Australian citizen (and was not a citizen of any other country); received an Australian pension; had a Medicare card; and banked with an Australian bank.[68]

Mr GH returned to Bali just prior to the COVID pandemic in early 2020. He was unable to return to Perth until January 2023, when he stayed for a few weeks before going back to Bali in February 2023. He did not return to Perth again until 5 February 2024. He did not intend to stay in Bali for so long from February 2023 to February 2024, but was unable to travel to Perth due to the deterioration in his health.[69] After Mr GH was taken to hospital on 5 February, notes were created to the effect that Mr GH lived in Bali and had done for over twenty years (Deputy President Jackson said

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[61] Ibid.
[62] Ibid [40]–[43]. Mr GH's witness statement was prepared by his legal representative, who asked him questions which he answered by writing on a whiteboard or by nodding to indicate his agreement.
[63] Ibid [44].
[64] Ibid [48].
[65] Ibid [49]–[50].
[66] Ibid [54].
[67] Ibid [56].
[68] Ibid [56]–[58].
[69] Ibid [59]–[60].

of the notes that 'the arithmetic as to how long… is plainly wrong').[70] It appears that Dr KL had these notes before him when conducting the first assessment.[71]

Notably, Mr GH did not own any real property in Bali, nor any personal belongings of any substance. When staying in Bali, Mr GH rented a furnished dwelling. By contrast, he did leave some possessions (clothes and tools) in Perth when he was in Bali.[72] His entire support network lived in Perth (his daughters and their families), and he only had casual friends in Bali.[73]

As to Mr GH's subjective perceptions of home, his witness statement set out that he did not consider Bali to be his home — he always thought of himself as a guest there.[74] He said that his home was WA, and EF said that 'when her father travelled to Bali, he would say that he is "going to Bali", and when coming back to Perth, he would say that he is "coming home".'[75]

2.2 *Review of the First Assessment*

Deputy President Jackson was first required to consider whether Mr GH's daughters, EF and IJ, were 'eligible applicants' who could seek review of the coordinating practitioner's decision under s 84(1)(a) of the *VAD Act*. That provision requires a person to be either a patient the subject of a relevant decision; their agent; or any other person who has a special interest in the medical care and treatment of the patient.[76] Notably, both the relevant Second Reading Speech and Explanatory Memorandum said that 'merely being a member of the person's family or their primary caregiver is not, on its own, intended to be sufficient to constitute having a special interest'.[77] However, Deputy President Jackson pointed out that the *VAD Act* itself 'does not, in fact, say anything like that at all'.[78]

Deputy President Jackson found that the requirement for a 'special interest' provides protection for patients by preventing applications for review from those whose concern may not be the welfare of the patient.[79] Thus, whether or not a person has a 'special interest' must be considered on a case-by-case basis.[80] Ultimately though, Deputy President Jackson chose not to determine whether EF and IJ had a 'special

[70] Ibid [62]–[66].
[71] Ibid [64].
[72] Ibid [51]–[52].
[73] Ibid [68].
[74] Ibid [67].
[75] Ibid [67]
[76] See *VAD Act* (n 1) s 83.
[77] *EF* (n 3) [18].
[78] Ibid.
[79] Ibid [22].
[80] Ibid [23].

interest', because they could instead be properly regarded as their father's agents — Mr GH's health meant he was unable to bring the application without their assistance, and his daughters acted as applicants to give effect to his wishes.[81]

Turning to the substantive review itself, Deputy President Jackson noted that, just as in *AB*, the only issue was whether Mr GH met the residence criterion in s 16(1)(b)(ii) of the *VAD Act*. His Honour expressly adopted the construction and principles relating to that criterion as set out by President Pritchard in *AB*.[82] Applying those principles to the present case, Deputy President Jackson ultimately found that Mr GH had been ordinarily resident in WA since moving from Sydney to Perth in 1977 — he remained ordinarily resident in the state even when he spent more time in Bali than he did in WA.[83] Critically, Mr GH always maintained both a physical and emotional connection to WA during that period.[84]

The continued physical connection was demonstrated by maintaining possessions at the home of one of his daughters, and by continuing administrative ties (including banking, Medicare, Centrelink and medical assistance).[85] By contrast, Mr GH did not have any real physical connection to Bali — he did not have any constant accommodation there and he did not leave any of his belongings there whenever he left.[86]

The emotional connection was demonstrated by his entire support network being in Perth, and the fact that he considered Perth his home. He returned to Perth to visit his loved ones often, except when travel was 'effectively impossible' during the COVID pandemic and when he was too unwell to do so.[87] Deputy President Jackson placed 'considerable weight' on the evidence that he would call Perth 'home' on the occasions that he would return from Bali.[88]

Deputy President Jackson said that the most critical factor in this case was that all of Mr GH's healthcare needs had always been met in WA since 1977.[89] Accordingly, it would be consistent with the legislative intent underpinning the *VAD Act* to regard Mr GH as meeting the residence criterion: 'it cannot be said that he [was] taking advantage of this State's voluntary assisted dying scheme by simply visiting Perth for that purpose'.[90] Deputy President Jackson agreed that Mr GH was not 'a tourist with

[81] Ibid [24]–[27].
[82] Ibid [32]–[38].
[83] Ibid [70], [82].
[84] Ibid [72].
[85] Ibid.
[86] Ibid [73].
[87] Ibid [83].
[88] Ibid [74].
[89] Ibid [75].
[90] Ibid [76].

a home elsewhere' — he was 'someone who has come home to die peacefully with his family.'[91]

With this being the case, Deputy President Jackson set aside Dr KL's decision and, in substitution for that decision, decided that Mr GH had, at the time of his first request on 22 February 2024, been ordinarily resident in WA for a period of at least 12 months.[92]

C *HM and The Co-ordinating Practitioner for HM [2024] WASAT 23*

HM was also brought as an application for review of the coordinating practitioner's first assessment, which found that Ms HM satisfied all s 16 *VAD Act* criteria except for the residence criterion. Unlike in *AB* and *EF*, Deputy President Vernon found that Ms HM did not satisfy the residence criterion, despite having a number of enduring connections to WA.

3.1 *Factual Background*

Ms HM, who was 69 years old, was diagnosed with terminal cancer in Perth in October 2023. She made her first request for VAD on 13 March 2024, and on that same day her coordinating practitioner decided that Ms HM was ineligible only because she had not been ordinarily resident in WA for a period of at least 12 months.[93]

Ms HM moved to WA from overseas in 1980, with her family moving to join her only a few years later. She lived in various properties in WA between 1980 and 2014, when she moved to Tasmania with her partner.[94] After moving to Tasmania, Ms HM kept in close contact with her loved ones in WA and visited WA fairly regularly, staying with her sister or her son on each occasion. From 2015 to 2017 she returned to WA once a year for two or three weeks each time. In 2018 and 2019 she returned about twice a year for two or three weeks each visit. Due to pandemic-related border closures, Ms HM only visited WA once between 2020 and May 2022.[95]

In late 2021 or early 2022, Ms HM and her partner decided they wanted to return to WA to live. However, they resolved to renovate their Tasmanian property before selling it and making the move to WA. They signed a contract to buy a property in WA in February 2023, but they did not proceed with the purchase after a building inspection report disclosed structural issues.[96]

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[91] Ibid [81]–[82].
[92] Ibid [76].
[93] *HM* (n 4) [3].
[94] Ibid [24]–[35].
[95] Ibid [35]–[52].
[96] Ibid [53[–[60].

Ms HM came to WA on 1 September 2023, intending to stay for two weeks before returning to Tasmania to finish preparing the property for sale. However, Ms HM was admitted to hospital later that week and was ultimately diagnosed with terminal cancer during that visit in WA. She commenced treatment for her cancer in WA, and was still in WA at the date of the Tribunal hearing.[97]

As to her subjective intentions, Ms HM said that she moved to Tasmania because she thought it would be a nice place to live for some period of her retirement. She said that she never had any intention of living there permanently, and always intended to return to WA to live. She said that she always considered herself to be a West Australian, regarding her son's house and her sister's house as her homes in WA.[98]

Ms HM's counsel submitted that, for a number of reasons, Ms HM maintained a continuing physical and emotional connection to WA despite her time spent living in Tasmania. For example, Ms HM continued to use bank accounts opened in WA, kept some personal belongings in WA, and had taken active steps to return to WA.[99]

3.2 *Review of the First Assessment*

Deputy President Vernon started by accepting President Pritchard's construction of the term 'ordinarily resident' in *AB*.[100] Her honour quoted a passage from *AB* noting that the legislative intention underlying the residence criterion was 'clearly' to exclude those who might come to WA on a temporary and brief basis only to access VAD.[101] Deputy President Vernon agreed that Ms HM was not the kind of applicant that the legislature seemed concerned to preclude from accessing VAD in WA. Ms HM did not come to WA only for the purpose of accessing VAD, she had a longstanding association with WA, and she may fairly be described as being a Western Australian. However, Deputy President Vernon said that 'those considerations cannot override the ordinary and natural meaning of the criterion the legislature has seen fit to apply in s 16(1)(b)(ii).'[102]

Ultimately, her Honour found that the coordinating practitioner was correct: Ms HM did not satisfy the residence criterion. Ms HM was ordinarily resident in Tasmania from December 2014 until 1 September 2023. Although it is possible to be ordinarily resident in more than one place at a time, the totality of the evidence did not establish

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[97] Ibid [62]–[74].
[98] Ibid [75]–[81].
[99] Ibid [82].
[100] Ibid [13]–[20].
[101] Ibid [84] citing *AB* (n 2) [27].
[102] *HM* (n 4) [86]–[87].

that Ms HM was also ordinarily resident in WA at any time between December 2014 until 1 September 2023.[103]

Deputy President Vernon noted that Ms HM was an honest and reliable witness. Even though her evidence was unchallenged, and much of her evidence about her feelings and intentions was uncorroborated, her Honour accepted Ms HM's evidence.[104] Deputy President Vernon found that Ms HM did maintain a close emotional connection with WA because of her family and friends who live in WA. Ms HM did maintain some physical connection by visiting regularly, but this was only for very short periods of time — she only spent 6% of her time in WA during the time she lived in Tasmania.[105] Although she regarded her son's house and her sister's house as her homes in WA, evidence suggested that permission was required to stay there. Whilst she kept some possessions of convenience (mainly clothing) at those places, she did not maintain any significant possessions in WA. The vast majority of her possessions were at her property in Tasmania. The Tasmanian property was also her official residence for taxation and her driver's licence. She did not maintain a care relationship with any medical practitioners in WA whilst living in Tasmania. Her bank accounts were only nominally registered in WA — she did not attend WA branches.[106]

Even though Ms HM always intended to return to WA someday, the move to Tasmania was not temporary. Whilst she had been taking active steps to move back to WA since 2022, she did not actually do so until September 2023.[107] In deciding that Ms HM did not satisfy the residence criterion, Deputy President Vernon distinguished Ms HM's situation from the applicants in *AB* and *EF,* who had much stronger connections with WA whilst physically absent from the state:

> In particular, in AB and CD, the intervening period of living out of Western Australia were much shorter and for defined purposes. In NJT the time out of Victoria could properly be characterised as extended holidays during retirement, but always returning to Victoria, with significant 'administrative' connections to that state. In EF, the individual concerned had very limited possessions, and when he was not in the other location he lived, kept no possessions there. He also had significant 'administrative' ties in Western Australia. In particular, all his healthcare needs had been met in Western Australia for over 45 years before he sought access to voluntary assisted dying.[108]

[103] Ibid [89]–[90], [110]–[111].
[104] Ibid [22]–[25], [75].
[105] Ibid [92]–[94]. Deputy President Vernon noted that this proportion would have been higher if not for the COVID-19 pandemic and related border restrictions.
[106] Ibid [95]–[100].
[107] Ibid [101]–[107].
[108] Ibid [109].

III ANALAYSING THE REASONING AND DECISIONS

As *AB, EF* and *HM* all deal with the same issue, and because they were decided so close in time, they can be properly analysed together. The Tribunal's decisions in *AB*, *EF* and *HM* are coherent, sensible and sound. President Pritchard's construction of s 16(1)(b)(ii) in *AB* is the product of applying orthodox statutory interpretation principles, including particular focus on legislative purpose. Whilst s 16 of the *VAD Act* clearly intends to *confine* access to VAD to only certain eligible people,[109] it also operates to make VAD *available* to those who can be properly regarded as meeting the eligibility criteria.

As put by Former Chief Justice Murray Gleeson, speaking extracurially of statutory interpretation generally, '[t]he question is not so much one of identifying the legislative purpose as of working out how far Parliament has gone in pursuit of that purpose.'[110] The purpose of the residence criterion is to prevent what some have called 'death tourism'[111] by excluding those who might come to Western Australia only for the purpose of accessing VAD. The Tribunal has decided that in this instance, Parliament has not gone so far as to exclude those who have 'come home to die peacefully' after making WA their home, and — despite not being physically present in the state for some time — have maintained strong physical and emotional connections to WA.[112] Though perhaps broader than what some might regard as its commonly understood meaning, the term 'ordinarily resident' as used in s 16(1)(b)(ii) is capable of a construction which includes people in that category, and such a construction is most consistent with the purpose underlying the *VAD Act*.[113]

Considering all three cases together, it is clear that the Tribunal has not gone rogue by ignoring the ordinary and natural meaning of 'ordinarily resident'. In particular, *HM* demonstrates that the Tribunal's purposive construction of the residence criterion is appropriately limited by its ordinary and natural meaning.[114] It was not the legislative intention underlying the residence criterion to exclude people in Ms HM's position (ie, those who evidently did not come to WA only to access VAD). However, even applying the broad purposive construction of the term as distilled in *AB*, Ms HM could not be regarded as having been ordinarily resident in WA for the required period, and

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[109] *AB* (n 2) [27].
[110] Murray Gleeson 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (speech delivered at Victoria Law Foundation Oration, 31 Jul 2008) 21.
[111] 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.
[112] *EF* (n 3) [81].
[113] See *Interpretation Act 1984* (WA) s 18.
[114] See generally *Mills v Meeking* (1990) 91 ALR 16, 30–1 (Dawson J).

thus she did not satisfy the residence criterion.[115] If Deputy President Vernon had found Ms HM satisfied the residence criterion it would not have been consistent with the proper process of statutory interpretation, which demands that purpose influences the *construction* of the term, and then *that construction* is in turn applied to the *facts* of the case.[116] That is, it would be an error to skip the middle step and apply the purpose directly to the facts to determine the outcome of the case. There was no such error of statutory construction in *AB, EF* or *HM*: the underlying purpose of the law was used to determine the meaning of the residence criterion, which is interpreted broadly enough to include some people who have maintained very strong physical and emotional connections to WA despite not being physically present in WA for some time. That interpretation was then applied to the facts: in both *AB* and *EF,* the evidence demonstrated that the applicants had sufficiently strong connections to satisfy the residence criterion. In *HM*, the evidence simply did not demonstrate that the applicant's ongoing connection to WA was strong enough to satisfy the purposive construction of the term as adopted in *AB*.

Still, some might consider the Tribunal's approach to the term 'ordinarily resident' too flexible — especially having regard to the application of that construction to the facts in *EF,* where Mr GH had significant and indefinite absences from WA for more than a decade. But the reality is that people's lives and living arrangements can be complex — a flexible construction of the residence criterion is necessary to respond to that complexity and ensure the principles underpinning the *VAD Act* are upheld.[117] As acknowledged in the Victorian case *NTJ*, applied in *EF*, it is not uncommon for people to adopt a more nomadic lifestyle in their retirement.[118] And indeed, many people who are given a terminal diagnosis may, if they are well enough, choose to spend significant periods of time away from their usual home to travel, visit family and friends, put their affairs into order, or — as noted by President Pritchard in *AB* — to access medical treatment that is not available in WA.[119] Allowing people who are ordinarily resident in WA to make those choices, and then also choose to be at home for medical treatment and end of life care, is consistent with the principles underpinning the *VAD Act* (including respect for autonomy and the provision of high quality care).[120]

It is clear that any future proceedings relating to the residence criterion (and the *VAD Act* generally) are likely to be similarly guided by legislative purpose, but also

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[115] *HM* (n 4) [108]–[111].
[116] John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 635.
[117] *VAD Act* (n 1) s 4.
[118] *NTJ* (n 48) [88], applied in *EF* (n 3) [78]–[80].
[119] *AB* (n 2) [29].
[120] *VAD Act* (n 1) s 4.

close attention to the person's particular situation. As is evident from the Tribunal's decisions in *AB, EF* and *HM,* there is no simple test for determining whether a person was ordinarily resident in WA for a period of at least 12 months. Where a person has been living elsewhere during that period, it is clear that satisfaction of the criterion hinges primarily on the strength of the person's ongoing physical and emotional connections to WA (and as part of that, whether they have been ordinarily resident in some other place during the relevant period).[121] Decision-makers will need to closely consider how the residence criterion principles apply to the factual background of the particular case, ultimately deciding whether or not the balance of considerations supports a conclusion that the criterion is satisfied. It would, therefore, be inappropriate to draw broad generalisations as to categories of people who might or might not meet the criterion in light of *AB, EF* and *HM*.

Notably though, in both *AB* and *EF* considerable weight was given to the person's subjective perceptions of home and belonging.[122] While this approach properly recognises that the concept of 'home' inherently has subjective and emotional aspects,[123] it also opens the door to the possibility of self-serving evidence (in that any applicant can say they have a deep emotional connection to WA and call WA home). This might seem troubling, especially as applications for review under the *VAD Act* are unlikely to be genuinely challenged, and thus the evidence may not be effectively tested. For example, in *AB, EF* and *HM,* the coordinating practitioners were joined as respondents but did not make any appearance before the Tribunal and did not seek to contest the review. In the similar Victorian case *NTJ*, the coordinating practitioner sought review of *his own* decision, making him both the applicant and respondent in the matter.[124]

Despite this being the case, the possibility of self-serving evidence is not particularly problematic. Courts and tribunals are well equipped to evaluate the veracity of potentially self-serving evidence, especially by considering it in light of the broader context of the other evidence at trial.[125] For example, President Pritchard noted that

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[121] *HM* (n 4) [108]–[110].
[122] *AB* (n 2) [73]; *EF* (n 3) [74].
[123] See, eg, Hazel Easthope, 'A Place Called Home' (2004) 21(3) *Housing, Theory and Society* 128; Judith Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6(4) *Journal of Environmental Psychology* 281; Shirley L O'Bryant, 'The Subjective Value of "Home" to Older Homeowners' (1983) 1(1) *Journal of Housing For the Elderly* 29.
[124] *NTJ* (n 48) [5], [17]. Note that in this case, unlike in *AB* (n 2) and *EF* (n 3), the Voluntary Assisted Dying Review Board and the Secretary of the Department of Health and Human Services were joined as parties.
[125] See generally Aidan Ricciardo, 'First a Failure to Inform, then a Failure to Listen: Why the Plaintiff's Evidence About What They Would Have Done Should not be Inadmissible in Failure to Inform Cases' (2020) 26(2) *Torts Law Journal* 117, 132–4.

Mr AB's actions were consistent with his subjective perceptions of home,[126] and Deputy President Jackson pointed out that Mr GH's evidence was corroborated by evidence from his daughters.[127] Indeed, it is always open to a court or tribunal to disbelieve potentially self-serving evidence 'even where the evidence is unchallenged and uncontradicted.'[128]

Further, even where an applicant's evidence as to their subjective perceptions of home are accepted as truthful, it may be that the circumstances of the case as a whole mean this evidence should be afforded little weight in determining whether the residence criterion is satisfied. Indeed, this was the case in *HM*, where Deputy President Vernon accepted that Ms HM regarded herself as Western Australian. Her honour also accepted that Ms HM did not personally regard her move to Tasmania as permanent, but the circumstances suggested that her personal intentions were not borne out in the reality of what actually happened:

> [W]hilst I accept Ms HM did not think of the move as being permanent, it was not temporary. There was no time period set for the residence in Tasmania, nor was it defined by any limited purpose. As things transpired, the move lasted nearly 9 years.[129]

Thus, although evidence relating to subjective intentions and feelings is relevant in determining the residence criterion, it is by no means determinative, even where that evidence is accepted.

IV IS THE RESIDENCE CRITERION STILL APPROPRIATE?

AB, EF and *HM* also provide an opportunity for timely analysis of the residence criterion itself. The VAD legislation in each Australian state requires a person to have been ordinarily resident in the state for at least 12 months prior to making their first request for VAD.[130] Of course, this suggests that *AB, EF* and *HM* are likely to be influential precedents should the equivalent provisions be considered by any court or

[126] *AB* (n 2) [73].
[127] *EF* (n 3) [67].
[128] Ricciardo (n 125) 134.
[129] *HM* (n 4) [103].
[130] *Voluntary Assisted Dying Act 2022* (NSW) s 16(1)(c); *Voluntary Assisted Dying Act 2021* (Qld) s 10(1)(f)(i); *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(b) (ii)–(iii); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 11(1)(b); *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(b)(ii)–(iii); *VAD Act* (n 1) s 16(1)(b)(ii).

tribunal in those other jurisdictions.[131] However, it also suggests that the residence criterion is either redundant or in need of modification.

Victoria was the first Australian state to legalise VAD,[132] and WA was the second. Perhaps understandably at that time, there was great concern that out-of-state residents might travel to a state only to access VAD.[133] However, now that all Australian states have passed broadly similar VAD legislation, that concern — at least in relation to interstate residents — should be put to rest. As put by Del Villar, Willmott and White, '[a]s all six states have now enacted VAD laws of their own, the likelihood of interstate VAD tourism has greatly diminished.'[134] The facts of *AB* and *HM* demonstrate how the residence criterion now leads to some absurdity. Mr AB had spent the majority of the 12 months prior to making his first request in New South Wales. VAD became available in New South Wales in November 2023, more than a month before the Tribunal decided that Mr AB was eligible under the Western Australian *VAD Act*.[135] Although not ultimately borne out in *AB,* there is absurdity in the mere possibility of a person not being eligible for VAD by virtue of not meeting the residence criterion even though VAD is also available in the state they came from. That reality was actually borne out in *HM*. VAD has been available in Tasmania since October 2022 — had Ms HM remained in Tasmania, she would likely have been eligible to access it there.[136] However, as put by Deputy President Vernon, Ms HM 'had the misfortune of being diagnosed with a terminal cancer when she was [visiting] in Western Australia'.[137] This may be regarded as a dual misfortune — first, the grave misfortune of being diagnosed with a terminal cancer; and second, the misfortune of experiencing that diagnosis, treatment and deterioration in a jurisdiction other than the one where Ms HM would have been eligible for VAD. The situations in *AB* and *HM* demonstrate how the residence criterion is too restrictive a measure to achieve its purpose of simply precluding 'death tourism'.

Of course, concerns about 'death tourism' may remain for those who are not coming from another Australian state, but who might come from one of Australia's territories or from another country where VAD is not available. To the extent that there are concerns about people who might come from overseas, the VAD legislation

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131 Indeed, *NTJ* (n 48) was regarded as influential in *AB* (n 2) and *EF* (n 3). These decisions might, however, be less persuasive in New South Wales and Queensland due to their residence criterion exemption pathway, as discussed later in this Part.

132 Although Victoria was the first Australian state to legalise VAD, assistance in dying had previously been briefly lawful in the Northern Territory. See *Rights of the Terminally Ill Act 1995* (NT).

133 See, eg, Western Australian Ministerial Expert Panel on Voluntary Assisted Dying, *Final Report* (Report, 27 June 2019) 20.

134 Del Villar, Willmott and White (n 18) 30.

135 VAD became available in New South Wales on 28 November 2023.

136 *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 10.

137 *HM* (n 4) [86].

in each state already contains safeguards which at least partially address this concern.[138] For example, the Western Australian *VAD Act* requires a person to be an Australian citizen or permanent resident to be eligible for VAD.[139] The territories only recently regained their ability to legislate with respect to VAD in December 2022.[140] The Australian Capital Territory has already introduced a VAD Bill into its parliament,[141] and the Northern Territory Government has stated that it is considering legalising VAD, and has established a VAD expert advisory panel.[142]

Still, there are less restrictive means than the existing residence criterion to preclude any remaining 'death tourism'. The *VAD Act* could be amended to allow the residence criterion to be satisfied where the person has been ordinarily resident in another Australian jurisdiction where VAD is legal. The *VAD Act* could also be amended to introduce a pathway for exemptions to be granted in certain cases where the applicant does not satisfy the residence criterion. These proposed amendments are explored in more detail below.

A *Recommendation 1: Recognise Residence in Other Australian Jurisdictions where VAD is Legal*

The VAD legislation in each Australian jurisdiction should be amended to allow the residence criterion to be satisfied where the applicant has been ordinarily resident in any Australian jurisdiction, or some mix of Australian jurisdictions, where VAD is legal. For example, the residence criterion in s 16 of the Western Australian *VAD Act* could be redrafted to the following effect (the 'proposed amendment'):

> The person… at the time of making a first request, has for a period of at least 12 months been ordinarily resident in –
>
> - Western Australia; or

[138] *Voluntary Assisted Dying Act 2022* (NSW) s 16(1)(b)(iii*); Voluntary Assisted Dying Act 2021* (Qld) s 10(1)–(2); *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(b)(i); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 11(1)(a)(iii); *Voluntary Assisted Dying Act* 2017 (Vic) s 9(1)(b)(i); *VAD Act* (n 1) s 16(1)(b)(i). However, note that there are differences between these provisions — they all relate to Australian citizenship and residency, but they are not uniform.

[139] *VAD Act* (n 1) s 16(1)(b)(i), which is the same as *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(b)(i). It is important to note that these provisions exclude citizens of New Zealand residing in Australia, as well as other long-term residents who have not obtained citizenship or permanent residency — see *YSB v YSB (Human Rights)* [2020] VCAT 1396.

[140] *Restoring Territory Rights Act 2022* (Cth).

[141] *Voluntary Assisted Dying Bill 2023* (ACT).

[142] Northern Territory Government — Department of the Chief Minister and Cabinet, 'Voluntary Assisted Dying Advisory Panel' <https://cmc.nt.gov.au/project-management-office/voluntary-assisted-dying/vad-advisory-panel>. Note that it is possible for the *Voluntary Assisted Dying Act 2022* (NSW) to be extended to apply to Norfolk Island by the *Norfolk Island Applied Laws Ordinance 2016* (Cth).

- Any Australian state or territory, or more than one Australian state or territory, where voluntary assisted dying is legal for eligible people.

The term 'voluntary assisted dying' is already defined appropriately in s 5 of the *VAD Act* to enable the proposed amendment to operate properly. An amendment to this effect might still be criticised for permitting a very narrow class of 'death tourism'. Given the minor variations in eligibility criteria between Australian states, this amendment may permit a person who does not meet the eligibility criteria for VAD in their own state to access VAD by travelling to another state where they are eligible. However, given the high degree of similarity of the eligibility criteria amongst each state's VAD legislation,[143] this is not likely to arise often. It does not offset the desirability of fixing the present absurdity which might preclude a person from accessing VAD even though they have come from another Australian jurisdiction where they would have been eligible.

In this regard, it is worth bearing in mind the reality that there are a range of reasons why a person might choose to move, or might be forced to move, to a different jurisdiction in the 12 months prior to their death. Take the following fictional — but realistic — scenario as an example:

> Until 6 months ago, Ms X has undoubtedly been ordinarily resident in Victoria for her entire life. Victoria is the only place where she was ever ordinarily resident. However, 6 months ago Ms X was diagnosed with a terminal illness which caused her health to rapidly deteriorate to the point where she required a high level of daily assistance. Ms X did not want to move into a nursing home, but her son who lived in WA was willing to care for her if she could move to Western Australia. Ms X was also happy to be spending her remaining time with her son. Ms X moved to WA to be cared for by her son. However, Ms X's terminal illness has now progressed to the point where she is experiencing suffering that cannot be relieved in a manner that she considers tolerable. She has made a first request for VAD. The coordinating practitioner has assessed her as meeting all of the eligibility criteria in s 16 of the *VAD Act*, except for the residence criterion. Ms X has received legal advice that she would likely be eligible for VAD in Victoria, but she is too unwell to travel back to Victoria to attempt to access VAD there.

In this situation, there is no doubt that Ms X would not meet the current residence criterion — she has not been ordinarily resident in WA for a period of at least 12 months prior to making her first request. She has moved to WA for an understandable reason. She has not moved for the purpose of accessing VAD in WA. Had she remained in Victoria, she likely would have been able to access VAD there. But because she has moved to WA, the residence criterion precludes her from accessing VAD in WA. Precluding a person in Ms X's position from accessing VAD in WA does

[143] Waller et al (n 12) 1424–35.

very little to further the purpose and principles underpinning the *VAD Act*. The same is true in relation to the applicant in *HM*. These situations demonstrate how the current residence criterion is unduly restrictive and why it would be appropriate to enact the proposed amendment set out above.

B *Recommendation 2: Introduce Residence Criterion Exemptions*

The residence criterion in the VAD legislation in WA, Victoria, South Australia and Tasmania should also be made less restrictive by adopting the approach set out in the New South Wales and Queensland VAD legislation. Those statutes permit a residence criterion exemption to be granted if a person has a 'substantial connection' to the state and there exist 'compassionate grounds'.[144] Those statutes provide examples of people who might have a substantial connection to the state, including 'a person who resides outside [the state] but who is a former resident of [the state] and whose family resides in [the state].' [145] Given the strong resemblance between this example and the facts in *EF*,[146] it will be interesting to see whether the term 'ordinarily resident' might be interpreted more narrowly in New South Wales and Queensland than it has been in Western Australia and Victoria.[147] It certainly appears that the legislative intent in New South Wales and Queensland is to deal with cases like these through the exemption pathway, rather than by adopting a more flexible construction of the term 'ordinarily resident'.

There are also other situations where exemptions might have a role to play, even in conjunction with the proposed amendment set out above at 'Recommendation 1'.[148] In addition to that proposed amendment, it would also be appropriate for WA (and other jurisdictions) to permit exemptions to be made to the residence criterion. Indeed, this need was acknowledged by the WA Ministerial Expert Panel on Voluntary Assisted Dying, which recommended that an exemption pathway be adopted for a range of good reasons:

> … there may be some circumstances where these strict requirements may result in unnecessary hardship and grief. For example, a person who may genuinely have moved to and established residency in Western Australia and is diagnosed with an eligible condition before 12 months have elapsed; or, a Western Australian who has been living interstate, is diagnosed with an eligible condition and wants to return home to be with family when they die. Western

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[144] *Voluntary Assisted Dying Act 2022* (NSW) s 17; *Voluntary Assisted Dying Act 2021* (Qld) ss 10(1)(f)(ii), 12.
[145] *Voluntary Assisted Dying Act 2022* (NSW) s 17(2)(a); *Voluntary Assisted Dying Act 2021* (Qld) s 12(2)(a).
[146] And arguably, to a lesser extent, *AB* (n 2).
[147] *AB* (n 2); *EF* (n 3); *NTJ* (n 48).
[148] See, eg, the other examples set out in *Voluntary Assisted Dying Act 2022* (NSW) s 17(2)(a); *Voluntary Assisted Dying Act 2021* (Qld) s 12(2)(a).

> Australia also has a significant community of fly-in/fly-out workers who may have more than one legitimate 'ordinary residence'. The Panel therefore recommends that there be provision to enable people to apply to the State Administrative Tribunal for relief from the strict requirements of residency, in exceptional circumstances, on compassionate grounds.[149]

That recommendation was not ultimately implemented in the Western Australian *VAD Act*. Whilst it would now be desirable to amend the VAD legislation in WA, Victoria, South Australia and Tasmania to introduce residence criterion exemptions in the same style as the New South Wales and Queensland legislation, introducing exemptions is no substitute for *also* enacting the proposed amendment set out above at 'Recommendation 1'. As put by Del Villar, Willmott and White in the context of the eligibility criterion requiring Australian citizenship or permanent residence:

> … [M]aking provisions for granting exemptions as the primary means of addressing [the problem] is not the optimal method... This will require a person to make an additional application for determination of their residence status, which introduces further administrative hurdles into an already complex process, and causes delay at a time when death is imminent, and the person concerned is suffering significantly. It may, however, be worth considering in conjunction with [other] reform options…[150]

That same reasoning applies in this context — whilst exemptions to the residence criterion should be permitted where a person has a substantial connection to the state and there exist compassionate grounds, this should only be required where an applicant does not satisfy the proposed amendment for a relaxed residence criterion as set out above.

C *Summary of Recommended Amendments to the Residence Criterion*

In summary — and in light of *AB, EF* and *HM,* and the developments in VAD legislation across Australia — the residence criterion in s 16(1)(b)(ii) of the *VAD Act* is no longer appropriate. Despite the liberal construction adopted in *AB*, the residence criterion remains too restrictive. It would be appropriate to adopt a more flexible approach by enacting the proposed amendment which allows the residence criterion to be satisfied where the person has been ordinarily resident in another Australian jurisdiction where VAD is legal, and by permitting exemptions to be made where that relaxed criterion is not satisfied. Notably (and perhaps regrettably), although the *VAD Act* is currently undergoing its first statutorily mandated review,[151] the community

[149] Western Australian Ministerial Expert Panel on Voluntary Assisted Dying (n 133) 20.
[150] Del Villar, Willmott and White (n 18) 37–8.
[151] Amber-Jade Sanderson, 'Panel Appointed to Review WA's Voluntary Assisted Dying Laws' (Media Statement, 10 November 2023) <https://www.wa.gov.au/government/media-statements/Cook-

consultation material expressly states that the review 'is not seeking feedback on whether… there should be changes to eligibility criteria'.[152]

Whilst the discussion in this Part has centred on the Western Australian *VAD Act* (because that is the focus of this article), it can be broadly applied to the equivalent provisions in other Australian states. The recommended amendments set out above are proposed on the assumption that legislatures would not be willing to part with the residence criterion altogether. This is probably a reasonable assumption given the widespread and entrenched concerns about 'death tourism' which were present during the law reform processes which led to the *VAD Act* and its interstate equivalents.[153] These concerns, and the desire to implement 'safeguards' to address them, are symptomatic of overarching anxieties about legalising VAD being a 'slippery slope' — ie, one step in a chain of events which might progressively lead to allowing undesirable or unfathomable applications of assistance in dying.[154] Although the nature of this 'slippery slope' argument has been criticised,[155] VAD law reform throughout Australia has emphasised the numerous legislative 'safeguards' — including the residence criterion —[156] so as to abate concerns surrounding the 'slippery slope' and risks to vulnerable people.[157]

Of course, if the legislature is willing to part with one of those safeguards, an alternative amendment to the *VAD Act* is to do away with the residence criterion altogether. Indeed, this might be particularly appropriate in light of scholarship which suggests that each state's residence criterion might be vulnerable to challenge under s 117 of the *Australian Constitution*, which prevents discrimination against out-of-state

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Labor-Government/Panel-appointed-to-review-WA's-Voluntary-Assisted-Dying-laws-20231110>. The review report is due to be tabled in parliament before July 2024 — see *VAD* Act (n 1) s 164.

152 Government of Western Australia — Department of Health, 'Voluntary Assisted Dying Act 2019 Review — Stage 1' (Web Page, 10 November 2024) <https://consultation.health.wa.gov.au/ced-clr-vad/vad-act-review/>.

153 See, eg, Western Australian Ministerial Expert Panel on Voluntary Assisted Dying (n 133) 20; Victorian Ministerial Advisory Panel on Voluntary Assisted Dying (n 14) 54.

154 See, eg, Frances Norwood, Gerrit Kimsma and Margaret P Battin, 'Vulnerability and the "Slippery Slope" at the End-of-Life: a Qualitative Study of Euthanasia, General Practice and Home Death in The Netherlands' (2009) 26(6) *Family Practice* 472; Linda Ganzini and Holly Prigerson, 'The Other Side of the Slippery Slope' (2004) 34(4) *Hastings Centre Report* 3; Ian H Kerridge and Kenneth R Mitchell, 'The Legislation of Active Voluntary Euthanasia in Australia: Will the Slippery Slope Prove Fatal' (1996) 22(5) *Journal of Medical Ethics* 273; Penney Lewis, 'The Empirical Slippery Slope from Voluntary to Non-voluntary Euthanasia' (2007) 35(1) *Journal of Law and Medical Ethics* 197.

155 See, eg, D Benatar, 'A Legal Right to Die: Responding to Slippery Slope and Abuse Arguments' (2011) 18(5) *Current Oncology* 206, 206.

156 See, eg, Western Australian Ministerial Expert Panel on Voluntary Assisted Dying (n 133) iv–vi, 20; Victorian Ministerial Advisory Panel on Voluntary Assisted Dying (n 14) 151.

157 Del Villar, Willmott and White (n 18) 43. See also Eliana Close, Lindy Willmott and Ben P White, 'Regulating Voluntary Assisted Dying Practice: A Policy Analysis from Victoria, Australia' (2021) 125 *Health Policy* 1455.

residents.[158] Repealing the residence criterion might also be appropriate to promote fairness and consistency – as noted by Del Villar and Simpson:

> Even if VAD laws eventually pass in all Australian states and territories, the widespread retention of the 12-month minimum residency requirement would leave many eligibility cracks for new residents, and others, to fall through.[159]

As noted above, each state's VAD legislation already requires Australian citizenship or residency as part of its eligibility criteria —[160] if each Australian jurisdiction legalises VAD, there is little extra to be achieved by the residence criterion.[161]

V OBSERVATIONS ABOUT FIRST ASSESSMENTS

As a final topic of analysis, the issues raised in *AB* and *EF* also permit certain observations to be made about first assessments conducted by coordinating practitioners. This Part first considers whether it is appropriate to use pre-existing medical records when making assessments as to the residence criterion. It then discusses whether health practitioners should be tasked with making determinations as to legal standards.

A *Using Medical Records to Determine the Residence Criterion*

Notably, the Western Australian Voluntary Assisted Dying Guidelines list 'medical records' at the very top of the list of '[d]ocuments that may assist a medical practitioner to make an evidence-informed decision' as to residence.[162] It appears that in both *AB* and *EF,* the coordinating practitioners based their assessment as to the residence criterion at least partly on information contained in pre-existing medical records. In *AB*, Dr CD had before her 'information from the palliative care team… that [Mr AB] had only recently moved to Western Australia' and 'notes from Mr AB's first admission

[158] See Del Villar and Simpson (n 111).
[159] Ibid 1044.
[160] *Voluntary Assisted Dying Act 2022* (NSW) s 16(1)(b)(iii); *Voluntary Assisted Dying Act 2021* (Qld) s 10(1)–(2); *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(b)(i); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 11(1)(a)(iii); *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(b)(i*); VAD Act* (n 1) s 16(1)(b)(i). Again, note that there are differences between these provisions — they all relate to Australian citizenship and residency, but they are not uniform. For further discussion and analysis on this criterion, see Del Villar, Willmott and White (n 18).
[161] Though see the discussion of other potential rationales underlying the state-based residence criterion in Del Villar and Simpson (n 111).
[162] Government of Western Australia — Department of Health, *Western Australian Voluntary Assisted Dying Guidelines* (Guidelines, 2023) 34, table 6.

to hospital … [which] said that Mr AB had very recently arrived to stay with his friend'.[163] In *EF*, there were Emergency Department notes which recorded that Mr GH had been 'living in Bali', as well as notes made by an ear, nose and throat consultant which said that Mr GH 'lives in Bali (has been for > 20 years)'.[164]

In *AB*, President Pritchard commented that 'there seems to have been minimal evidence available to Dr CD in relation to where, in fact, Mr AB had been ordinarily resident prior to the First Request'.[165] In *EF*, Deputy President Jackson said — without suggesting anyone was to blame — that the period of time in the consultant's notes was 'plainly wrong',[166] and noted that both of Mr GH's daughters said that 'they were not given an opportunity to discuss' with Dr KL where their father had been living.

These aspects of *AB* and *EF* demonstrate the undesirability of coordinating practitioners relying too heavily on medical records when conducting first assessments — at least in relation to the residence criterion. As demonstrated by these cases, medical records can be inaccurate in this regard, and might only tell part of the story. This is unsurprising for two reasons. First, because several studies have highlighted issues with the accuracy of hospital and medical records generally.[167] And because secondly — as a matter of common sense — a patient might provide simplistic, vague or incomplete information about where they have been living if they do not perceive that information as particularly important to their treatment. That is, these notes are typically made in the course of obtaining a medical history — they are unlikely to include precise and accurate details as to where and how a person has been living, because that is not the purpose for which these notes are made. To rely on records gathered for one purpose in the decision-making process for an unrelated matter — or at least to treat those records as determinative — would not be appropriate in this context.[168]

Coordinating practitioners should, where possible, obtain information about the person's residence separately from pre-existing hospital records. In cases where the residence criterion is not obviously satisfied,[169] they should also ensure that there is a

[163] *AB* (n 2) [39].
[164] *EF* (n 3) [62].
[165] *AB* (n 2) [39].
[166] *EF* (n 3) [66].
[167] A I Neugut and R H Neugut, 'How Accurate are Patient Histories' (1984) 9(4) *Journal of Community Health* 294; William R Hogan and Michael M Wagner, 'Accuracy of Data in Computer-based Patient Records' (1997) 4(5) *Journal of the American Medical Informatics Association* 342; J Tse and W You, 'How Accurate is the Electronic Health Record? — A Pilot Study Evaluating Information Accuracy in a Primary Care Setting' (2011) 168 *Studies in Health Technology and Informatics* 158.
[168] This is not said to suggest that Dr CD and Dr KL unduly relied on the hospital records before them — the Tribunal's decisions do not go into enough detail to permit that conclusion, and the decisions are careful not to lay any blame on Dr CD or Dr KL.
[169] For an example of a case where the criterion would obviously be satisfied, see *AB* (n 2) [30], where President Pritchard notes that '[i]n the case of a person who applies to access voluntary assisted dying,

real opportunity to discuss the details of the person's living situation. Indeed, the Western Australian Voluntary Assisted Dying Guidelines state that 'it is recommended that the [practitioner] seeks evidence from the patient to inform their decision.'[170] This is necessary because, as demonstrated by *AB* and *EF*, there are a vast array of considerations that are relevant to residence criterion assessments.

B *Health Practitioners as Decision-makers*

The preceding discussion, as well as the facts of *AB* and *EF*, might cause some to question whether health practitioners are properly suited to making determinations as to legal standards (eg, whether or not a person is ordinarily resident in a particular place). Indeed, an empirical study examining physician experiences of providing VAD in Victoria found that participant physicians reported understanding and applying the VAD law as 'significant' challenges.[171] Taking the residence criterion as an example, *AB, EF* and *HM* demonstrate how legal standards can be complex and multifactorial, and how the terms used in legislation may not always align perfectly with how they might commonly be understood. Accordingly, some might question whether the determination of legal issues is beyond the expertise and ability of health practitioners acting as coordinating practitioners under the *VAD Act*.

To the extent that those concerns might exist, they are not well founded. It is worth considering that many laws — not just the *VAD Act* — require people without legal training to make determinations involving legal standards. Of course, this is true of most administrative decisions. In this context, it is relevant to note that the *VAD Act* requires health practitioners to undergo approved training in order to act as a coordinating practitioner.[172] So long as the training and resources provided to health practitioners provide them with the relevant information as to the legal standards,[173] health practitioners should be able to apply that information when making decisions about those standards.

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and who has made Western Australia their home or abode, and who has not left the State at all, for at least 12 months prior to making their first request, satisfaction of the criterion in s 16(1)(b)(ii) will pose no difficulty.'

[170] Government of Western Australia — Department of Health (n 162) 34, [8.1.3].

[171] Jodhi Rutherford, Lindy Willmott and Ben White, 'What the Doctor Would Prescribe: Physician Experiences of Providing Voluntary Assisted Dying in Australia' (2023) 87(4) *Journal of Death and Dying* 1063, 1069–70.

[172] *VAD Act* (n 1) s 25. See also *VAD Act* (n 1) s 36 in relation to training for consulting practitioners. These requirements are based on the *Voluntary Assisted Dying Act 2017* (Vic), with Victoria being 'the first jurisdiction internationally to legislatively mandate training for doctors conducting eligibility assessments of patients' — see Ben P White et al, 'Development of Voluntary Assisted Dying Training in Victoria, Australia: A Model for Consideration' (2021) 36(3) *Journal of Palliative Care* 162, 162.

[173] Close, Willmott and White (n 157) 1473; White et al (n 172) 165.

Indeed, in their everyday practice, health practitioners are required to make a host of decisions which involve legal standards. For example, health practitioners routinely make assessments as to whether or not a person has the requisite capacity to provide effective legal consent to medical treatment, or whether a child is 'Gillick competent' such that they can make their own healthcare decisions.[174] As Lord Fraser relevantly said in *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112*,* the medical profession is a 'learned and highly trained profession regulated by statute and governed by a strict ethical code which is vigorously enforced.'[175] It follows that it is appropriate for health practitioners to be tasked with making certain determinations in relation to their patients which involve legal standards.

Of course, given the complexity inherent in some legal standards, there will be occasions where an incorrect decision is made at first instance.[176] Both *AB* and *EF* fit into this category. As demonstrated by *AB* and *EF,* this is why a right of review to a court or tribunal is important. The *VAD Act* appropriately allows an applicant to seek review in the Tribunal for decisions relating to the residence criterion; whether the person has decision-making capacity in relation to VAD; and whether the person is acting voluntarily and without coercion.[177]

Notably, there is no right of review in relation to the eligibility criteria that relate to medical, rather than legal, standards. That is, there is no right of review in relation to decisions about whether the person's disease is advanced, progressive and will cause death; whether it is expected to cause death within the relevant timeframe; and whether it is causing the requisite kind of suffering to the person.[178] These questions, which demand medical and clinical expertise, are best left to be conclusively determined by health practitioners.

Whether decisions relate to legal, medical or other matters, it is a reality that all of these determinations can be challenging for practitioners involved in the provision of VAD.[179] As noted in Rutherford, Willmott and White's study of VAD-providing physician experiences, this is partly due to the time pressures involved:

> … [W]hat the Victorian doctors who have participated in this study would prescribe for legal VAD is more time. Time to do exhaustive assessments of eligibility. Time to get to know

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[174] See generally Greg Young, Alison Douglass and Lorraine Davison, 'What do Doctors Know About Assessing Decision-making Capacity?' (2018) 131(1471) *New Zealand Medical Journal* 58.
[175] *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112, 191 (Lord Fraser).
[176] The same even is true when people who *are* legally trained make decisions as to legal standards.
[177] *VAD Act* (n 1) s 84.
[178] See ibid s 16(1)(c).
[179] Jodhi Rutherford , Lindy Willmott and Ben P White, 'Physician Attitudes to Voluntary Assisted Dying: a Scoping Review' (2021) 11 *BMJ Supportive & Palliative Care* 200, 205.

> their patient... Yet, time is in short supply for doctors who are choosing to participate in VAD in Victoria, owing to statutory, operational, and applicant factors.[180]

VI CONCLUSION

In order to prevent people coming to the state only to access VAD, the Western Australian *VAD Act* requires a person to be ordinarily resident in the state for a period of at least 12 months before they make their first request for VAD. This is also true of the VAD legislation in other Australian states.[181] In *AB* and *EF*, the first two cases to consider the *VAD Act*, the Tribunal decided that two people were eligible to access VAD despite spending very little time in WA in the preceding 12 months. By interpreting the term 'ordinarily resident' by reference to its legislative purpose, the Tribunal decided that the term could — and in those two cases, should — be construed broadly enough to include those who have made WA their home, and (despite not being present in the state for some time) have maintained very strong physical and emotional connections to WA. In the third case, *HM*, the Tribunal found that the applicant's ongoing connections to WA were not as strong as in *AB* and *EF*, and that the residence criterion could not be satisfied. *HM* demonstrates that the broad purposive construction adopted in *AB* and *EF* is appropriately limited by the ordinary and natural meaning of the term 'ordinarily resident',

This article has provided an overview and analysis of *AB, EF* and *HM*, concluding that these decisions are sensible and sound. Importantly, these cases demonstrate that residence criterion assessments demand a close and careful examination of the relevant factual background. Accordingly, it is not appropriate to draw broad generalisations as to categories of people who may or may not satisfy the criterion in light of *AB, EF* and *HM*. However, it is clear that where a person has been living elsewhere during the 12 months prior to their first request, satisfaction of the residence criterion will primarily depend on the strength of their ongoing physical and emotional connections to WA.

These cases also provide an opportunity for timely analysis of the residence criterion itself. Now that each Australian state has legislated broadly similar VAD frameworks, the residence criterion in the *VAD Act* is no longer appropriate. Even though the Tribunal has adopted a broad construction of the criterion, it remains more restrictive than it needs to be to fulfil its legislative purpose of preventing 'death tourism'.

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[180] Rutherford, Willmott and White (n 171) 1080–81.

[181] Though, as discussed above, New South Wales and Queensland allow an exemption to be granted in certain circumstances. See *Voluntary Assisted Dying Act 2022* (NSW) s 17; *Voluntary Assisted Dying Act 2021* (Qld) ss 10(1)(f)(ii), 12.