

THE EXCLUSION OF LONG-TERM AUSTRALIAN RESIDENTS FROM ACCESS TO VOLUNTARY ASSISTED DYING: A CRITIQUE OF THE 'PERMANENT RESIDENT' ELIGIBILITY CRITERION

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When state parliaments legalised voluntary assisted dying ('VAD'), they could not have anticipated that the requirement to be 'an Australian citizen or permanent resident' would be one of the main areas of controversy. This criterion of eligibility was intended to prevent people travelling from other countries to access VAD. However, because the term 'permanent resident' is not defined in the legislation, it has unfortunately prevented some long-term Australian residents from accessing VAD. We evaluate various definitions of 'permanent resident' and conclude that a plain English definition better suits the text, context, and purpose of the VAD laws than the technical definitions found in migration or citizenship legislation. We then suggest policy and statutory reform to ameliorate some of the problems which have occurred in practice.

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I INTRODUCTION

In the last five years, laws permitting voluntary assisted dying ('VAD') have been passed in all six states of Australia — in 2017 in Victoria,¹ followed by Western Australia in 2019,² Tasmania,³ South Australia,⁴ and Queensland in 2021,⁵ and most recently New South Wales in 2022.⁶ The legislation passed in all six Australian states is narrow, compared to other assisted dying laws around the world. Unlike many other jurisdictions,⁷ access to VAD in the Australian states is restricted to people who are already dying from a terminal illness.⁸ They must also

1 The *Voluntary Assisted Dying Act 2017* (Vic) ('VAD Act (Vic)') passed the Victorian Parliament on 29 November 2017, received Royal Assent on 5 December 2017, and the relevant sections for this article's purposes commenced operation on 19 June 2019.

2 The *Voluntary Assisted Dying Act 2019* (WA) ('VAD Act (WA)') passed the Western Australian Parliament on 10 December 2019, received Royal Assent on 19 December 2019, and commenced on 1 July 2021.

3 The *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) ('EOLC Act (Tas)') passed the Tasmanian Parliament on 23 March 2021, received Royal Assent on 22 April 2021, and commenced on 23 October 2022.

4 The *Voluntary Assisted Dying Act 2021* (SA) ('VAD Act (SA)') passed the South Australian Parliament on 24 June 2021, received Royal Assent on 1 July 2021, and the relevant sections for this article's purposes commenced operation on 31 January 2023.

5 The *Voluntary Assisted Dying Act 2021* (Qld) ('VAD Act (Qld)') passed the Queensland Parliament on 16 September 2021, received Royal Assent on 23 September 2021, and the relevant sections for this article's purposes commenced operation on 1 January 2023.

6 The *Voluntary Assisted Dying Act 2022* (NSW) ('VAD Act (NSW)') passed the New South Wales Parliament on 19 May 2022, received Royal Assent on 27 May 2022, and commenced operation on 28 November 2023.

7 *Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding* [Termination of Life on Request and Assisted Suicide (Review Procedures) Act] (Netherlands) 2001; *Loi Relative à L'Euthanasie* [Act on Euthanasia] (Belgium) 28 May 2002; *Legislation Reglementant les Soins Palliatifs Ainsi que L'Euthanasie et L'Assistance au Suicide* [Legislation Regulating Palliative Care and Euthanasia and Assisted Suicide] (Luxembourg) 16 March 2009; *Criminal Code*, RSC 1985, c C-46, ss 241.1–241.4; *Ley Orgánica 3/2021, de 24 de Marzo, de Regulación de la Eutanasia* [Organic Law, 3/2021, March 24, for the Regulation of Euthanasia] (Spain) ('*Spanish Euthanasia Act*').

8 In most Australian states, to be eligible, a person must have a disease, illness, or medical condition that is incurable, advanced, progressive, and is expected to cause death within six months (or 12 months if the condition is neurodegenerative): see, eg, *VAD Act* (Vic) (n 1) ss 9(1)(d), (4). The disease, illness, or medical condition must also be causing suffering that cannot be relieved in a manner that the person considers tolerable: at s 9(1)(d)(iv). See also *VAD Act* (NSW) (n 6) s 16(1)(d); *VAD Act* (Qld) (n 5) s 10(1)(a); *VAD Act* (SA) (n 4) ss 26(1)(d), (4); *EOLC Act* (Tas) (n 3) ss 10(1)(e), 14; *VAD Act* (WA) (n 2) s 16(1)(c). In Queensland, the person's death must be expected to occur within 12 months: *VAD Act* (Qld) (n 5) s 10(1)(a)(ii). Assisted dying is also restricted to those suffering a terminal illness whose death is expected within 6 months in some United States ('US') states: see, eg, *Oregon Death with Dignity Act*, Or Rev Stat §§ 127.800–127.897 (2023); *Washington Death with Dignity Act*, Wash Rev Code §§ 70.245.010–70.245.903 (2009) ('*Washington Act*'); and New Zealand: *End of Life Choice Act 2019* (NZ) s 5(1)(c) ('*EOLC Act* (NZ)').

be an adult,⁹ and have capacity to make decisions about VAD.¹⁰ In addition, two of the eligibility criteria relate to residence. One criterion is that the person must be ordinarily resident in the relevant state for at least 12 months prior to making the first request for VAD.¹¹ This has been subject to detailed analysis elsewhere, which concluded that the criterion might be vulnerable to constitutional challenge, particularly insofar as it restricts new residents of a state from accessing VAD within the first 12 months of moving to the state.¹² The second criterion — the focus of this paper — is that the person must be ‘an Australian citizen or permanent resident’.¹³

These narrow eligibility criteria, and the extensive procedural and other safeguards contained in the legislation, were deliberately chosen as a way of striking a balance between respect for the autonomous choices of people who are suffering at the end of their lives, and ensuring the safety of vulnerable members of the community.¹⁴ The stated intention behind the inclusion of residency requirements is to prevent people travelling from other states or countries to access VAD within the jurisdiction.¹⁵ Somewhat perversely, however, the framing of these residence requirements and government interpretation of the meaning of ‘permanent resident’ has in fact had the reverse effect — preventing some long-term residents within the state from accessing VAD.¹⁶ In Part II, we outline the ‘Australian citizen or permanent resident’ requirements in the VAD laws in all six Australian states,

- 9 *VAD Act* (NSW) (n 6) s 16(1)(a); *VAD Act* (Qld) (n 5) s 10(1)(d); *VAD Act* (SA) (n 4) s 26(1)(a); *EOLC Act* (Tas) (n 3) s 10(1)(a); *VAD Act* (Vic) (n 1) s 9(1)(a); *VAD Act* (WA) (n 2) s 16(1)(a).
- 10 *VAD Act* (NSW) (n 6) s 16(1)(e); *VAD Act* (Qld) (n 5) s 10(1)(b); *VAD Act* (SA) (n 4) s 26(1)(c); *EOLC Act* (Tas) (n 3) ss 10(1)(c), 12; *VAD Act* (Vic) (n 1) s 9(1)(c); *VAD Act* (WA) (n 2) s 16(1)(d).
- 11 *VAD Act* (NSW) (n 6) s 16(1)(c); *VAD Act* (Qld) (n 5) s 10(1)(f); *VAD Act* (SA) (n 4) ss 26(1)(b)(ii)–(iii); *EOLC Act* (Tas) (n 3) s 11(1)(b); *VAD Act* (Vic) (n 1) ss 9(1)(b)(ii)–(iii); *VAD Act* (WA) (n 2) s 16(1)(b)(ii).
- 12 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, arguing that it infringes s 117 of the *Australian Constitution*.
- 13 *VAD Act* (SA) (n 4) s 26(1)(b)(i); *VAD Act* (Vic) (n 1) s 9(1)(b)(i); *VAD Act* (WA) (n 2) s 16(1)(b)(i). See also *VAD Act* (NSW) (n 6) s 16(1)(b); *VAD Act* (Qld) (n 5) ss 10(1)(e), 12(1)(a); *EOLC Act* (Tas) (n 3) s 11(1)(a). See Table 1 for a discussion of these requirements.
- 14 See Department of Health and Human Services (Vic), *Ministerial Advisory Panel on Voluntary Assisted Dying* (Final Report, July 2017) 1, 5 (‘*Victorian Panel Report*’); Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2943, 2947, 2950, 2955 (Jill Hennessy, Minister for Health). For further discussion of the balance struck in Victoria’s ‘safe and compassionate’ framework, see 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, 421–2.
- 15 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2017, 3085 (Tim Pallas); Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 2017, 3253 (John Eren).
- 16 See below Parts II–III.

before considering the interpretation of the term ‘permanent resident’, as set out in Victoria’s policy documents.¹⁷

The requirement that a person be an ‘Australian citizen or permanent resident’ to access VAD is unique worldwide. Except for New Zealand,¹⁸ whose law has many similarities to Victoria’s, no other country or jurisdiction expressly restricts access to VAD to citizens or permanent residents. In Spain, a person must be either a Spanish citizen, legal resident, or have lived in Spain for 12 months.¹⁹ Canada and the United States (‘US’) states require a person to be resident in that jurisdiction without stipulating a minimum period of residence, and other countries contain no explicit citizenship or residence restrictions.²⁰

There have already been two officially reported cases in which long-term Australian residents have been held to be ineligible to access VAD in Victoria.²¹ The Voluntary Assisted Dying Review Board in Victoria has also reported this as an issue, without providing statistical evidence as to the magnitude of the problem.²² Medical practitioners have also anecdotally and when participating in interview studies reported this as an issue.²³ Part III of this paper describes the nature and scale of the problem this criterion has posed in practice, by reference to decisions of the Victorian Civil and Administrative Tribunal (‘VCAT’) and the Coroners Court of Victoria, interview studies with medical practitioners, as well as media reports and other publicly available evidence.

In Part IV, we evaluate possible legal interpretations of the ‘permanent resident’ requirement, having regard to the text, context, and purpose of the term. We conclude that the plain English definition best fits the context and purpose of VAD. In Part V, we outline alternative options for amendment of the VAD laws in Victoria, Western Australia, and South Australia which would clarify the law and thus avoid some of the problems which have occurred in practice in Victoria.

17 Department of Health and Human Services (Vic), *Voluntary Assisted Dying: Guidance for Health Practitioners* (Policy Document, July 2019) (‘*Victorian VAD Guidance*’). The focus of our analysis is Victoria, where this criterion has been reported to be already causing significant problems in practice, and the VAD legislation has been in operation for three years, providing a stronger evidence base.

18 *EOLC Act* (NZ) (n 8) s 5(1)(b).

19 *Spanish Euthanasia Act* (n 7) art 5(1)(a).

20 See Del Villar and Simpson (n 12) 1007–8 nn 59–63.

21 *Finding into the Death of Julian Victor Charles Bareuther* (Coroners Court of Victoria, COR 2019, 5236) (‘*Bareuther Finding*’); *YSB v YSB* [2020] VCAT 1396 (‘*YSB*’).

22 Voluntary Assisted Dying Review Board, *Report of Operations: July – December 2020* (Report No 4, February 2021) 15 (‘*VADRB Report 4*’); Voluntary Assisted Dying Review Board, *Report of Operations: June to December 2019* (Report No 2, February 2020) 7, 9 (‘*VADRB Report 2*’).

23 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; Melissa Cunningham, ‘Patients “Too Tired, Unwell” to Clear Assisted Dying’s Red Tape Hurdle’, *The Age* (online, 25 September 2019) <<https://www.theage.com.au/national/victoria/patients-too-tired-unwell-to-clear-assisted-dying-s-red-tape-hurdle-20190812-p52g63.html>>, discussing patients of Dr Nick Carr.

Finally, in Part VI we suggest policy solutions to clarify the definition of ‘permanent resident’ and to provide more flexibility in the types of evidence which may be used to verify permanent resident status. These policy measures can ameliorate these problems in the interim before legislative change is achieved.

II THE ‘AUSTRALIAN CITIZEN OR PERMANENT RESIDENT’ CRITERION

As mentioned above, one criterion of eligibility for VAD in all six states is Australian citizenship or residency. There are three distinct versions of this criterion in Australian VAD laws, as shown in Table 1.

Table 1: Australian Citizen or Resident Criterion under State VAD Laws

State	South Australia, Victoria, and Western Australia	New South Wales and Tasmania	Queensland
Criterion	<ul style="list-style-type: none"> • Australian citizen; or • permanent resident.²⁴ 	<ul style="list-style-type: none"> • Australian citizen; or • permanent resident; or • resident in Australia for at least 3 continuous years immediately before making a first request.²⁵ 	<ul style="list-style-type: none"> • Australian citizen; or • permanent resident; or • ‘ordinarily resident in Australia for at least 3 years immediately before mak[ing] [a] first request’;²⁶ or • has ‘a substantial connection to Queensland’ and there are ‘compassionate grounds for granting the exemption’.²⁷

The term ‘Australian citizen’ has a technical legal meaning, and is defined in the *Australian Citizenship Act 2007* (Cth) (*‘Australian Citizenship Act 2007’*).²⁸ The term ‘permanent resident’ has two distinct legal meanings, found in

24 *VAD Act* (SA) (n 4) s 26(1)(b)(i); *VAD Act* (Vic) (n 1) s 9(1)(b)(i); *VAD Act* (WA) (n 2) s 16(1)(b)(i).

25 *VAD Act* (NSW) (n 6) s 16(1)(b); *EOLC Act* (Tas) (n 3) s 11(1)(a).

26 *VAD Act* (Qld) (n 5) s 10(1)(e).

27 *Ibid* s 12(2).

28 *Australian Citizenship Act 2007* (Cth) s 4 (*‘Australian Citizenship Act 2007’*).

Commonwealth migration law²⁹ and citizenship law.³⁰ As it is being used in state laws, it might also bear its plain, ordinary meaning. ‘Permanent resident’ is not defined in any state VAD laws except in Queensland, where it is defined to mean: (a) ‘the holder of a permanent visa as defined by the *Migration Act 1958* (Cwlth), section 30(1)’; or (b) ‘a New Zealand citizen who is the holder of a special category visa as defined by the *Migration Act 1958* (Cwlth), section 32’.³¹

Because a person living in Queensland, Tasmania, or New South Wales can satisfy this criterion of eligibility if they can demonstrate they have been resident in Australia for three continuous years, the analysis in this paper will focus on Victoria, Western Australia, and South Australia, where a person who is not a citizen must be able to demonstrate they are a ‘permanent resident’ to be able to access VAD.

A Government Policy Guidance on Who Is a ‘Permanent Resident’

In the absence of a statutory definition of ‘permanent resident’, policy guidance provided by the relevant government department assumes greater importance. No relevant policy guidance exists in Western Australia.³² The Victorian Department of Health and Human Services has issued the *Voluntary Assisted Dying: Guidance for Health Practitioners* (‘*Victorian VAD Guidance*’), which contains detailed instructions on complying with the requirements of that state’s legislation.³³ Unfortunately, the *Victorian VAD Guidance* is not conclusive in describing who may be classified as a ‘permanent resident’, or how this status is to be demonstrated. It does make clear that short-term visitors to Australia are precluded from accessing VAD, stating: ‘A person who is here on a temporary work or holiday visa does not qualify.’³⁴ This statement seems consistent with the Victorian government’s stated purpose of including the residence requirements in its law, which was to prevent ‘[VAD] tourism’³⁵ or ‘death tourism’³⁶: that is, to prevent

29 See below Part IV(B)(1).

30 See below Part IV(B)(2).

31 *VAD Act* (Qld) (n 5) s 10(2).

32 The Western Australian policy simply exhorts medical practitioners to ‘explicitly confirm [that the patient is a citizen or permanent resident] with the patient and sight relevant supportive documentation’: Department of Health (WA), *Western Australian Voluntary Assisted Dying Guidelines* (Policy Document, 2022) 34 (‘*WA VAD Guidelines*’).

33 *Victorian VAD Guidance* (n 17).

34 *Ibid* 73.

35 This term was used by the Australian Medical Association (WA) in its submission to the Ministerial Expert Panel: Department of Health (WA), *Ministerial Expert Panel on Voluntary Assisted Dying* (Final Report, 2019) 20 (‘*WA Panel Report*’).

36 See, eg, Rohith Srinivas, ‘Exploring the Potential for American Death Tourism’ (2009) 13(1) *Michigan State University Journal of Medicine and Law* 91; Alexander R Safyan, ‘A Call for International Regulation of the Thriving “Industry” of Death Tourism’ (2011) 33(2) *Loyola of Los Angeles International and Comparative Law Review* 287; Mary Helen Spooner, ‘Swiss Irked by Arrival of “Death Tourists”’ (2003) 168(5) *Canadian Medical Association Journal* 600. It has

people coming from outside Victoria who do not 'have a therapeutic relationship with a Victorian medical practitioner' from obtaining access to VAD in Victoria.³⁷

The *Victorian VAD Guidance* then goes on to state that documents proving permanent residency include a permanent resident visa and a permanent resident Visa Grant Number.³⁸ It also states that '[m]any permanent resident visas are electronic and can be checked and printed or emailed by going to the Australian Government, Department of Home Affairs Visa Entitlement Verification Online ... website'.³⁹ It suggests that either a patient or a medical practitioner (with the patient's permission) may verify a person's permanent residency status using the Visa Entitlement Verification Online ('VEVO') system.⁴⁰ No other ways to provide evidence of permanent residence are mentioned apart from a visa document or VEVO printout. South Australia's *Voluntary Assisted Dying Clinical Guideline for Health Practitioners* ('SA VAD Clinical Guideline') similarly focuses on visas recorded in the VEVO system as proof of permanent residency.⁴¹ As will be discussed in Part IV below, if this is intended to be the sole way to demonstrate 'permanent residence', it reflects the narrow definition of the term 'permanent resident' in Commonwealth migration law.

Although the *Victorian VAD Guidance* and *SA VAD Clinical Guideline* do not explicitly state that a permanent resident visa or Visa Grant Number is definitively required, if a person is unable to provide verification of 'permanent residence' via a VEVO printout or Visa Grant Number, a medical practitioner may well determine that the person does not satisfy this criterion and therefore is not eligible for VAD. This narrow interpretation of the 'permanent resident' criterion not only excludes temporary visitors or tourists from accessing VAD; it also excludes a number of long-term residents who are not formally described as 'permanent residents' (particularly New Zealand citizens, and those who arrived in Australia prior to 1984). Additionally (as will be discussed in Part IV(B)(1) below), some categories of permanent resident visas are granted by operation of law, so they may not show

also been called 'suicide tourism': Saskia Gauthier et al, 'Suicide Tourism: A Pilot Study on the Swiss Phenomenon' (2015) 41(8) *Journal of Medical Ethics* 611; Charles Foster, 'Suicide Tourism May Change Attitudes to Assisted Suicide, but Not through the Courts' (2015) 41(8) *Journal of Medical Ethics* 620.

37 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2948 (Jill Hennessy, Minister for Health). See also Queensland Law Reform Commission, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 155 [7.412], 155–6 [7.417], 158 [7.435] where similar reasons are advanced.

38 *Victorian VAD Guidance* (n 17) 73.

39 *Ibid.*

40 *Ibid.*

41 See also SA Health, *Voluntary Assisted Dying Clinical Guideline for Health Practitioners* (Policy Document, 29 November 2023) 47.

up on the VEVO system.⁴² Further, it excludes those whose visa status is not recorded in the VEVO system, because they have not left Australia since 1990.⁴³

Like the Victorian Department of Health, the Victorian Voluntary Assisted Dying Review Board ('VAD Review Board') also appears to have taken a strict view of the 'permanent resident' criterion, stating documentary evidence in the form of either an email or printout of a person's permanent visa status is sufficient evidence of a person's permanent resident status,⁴⁴ or if the person has not travelled outside Australia since 1990, applying for an electronic visa record.⁴⁵ The VAD Review Board recommends beginning the VAD process as early as possible, as it can take several weeks to collect the required documentation.⁴⁶

B Decision Is Not Reviewable

The strict interpretation that appears to be given to the term 'permanent resident' by the Victorian and South Australian Departments of Health and the Victorian VAD Review Board has significant consequences for people seeking access to VAD in those states, and also in Western Australia if a similar policy position is adopted in that state. Although the relevant civil and administrative tribunal in each state has jurisdiction to review some of the eligibility criteria, whether a person meets the 'permanent resident' requirements is not one of the matters which any state tribunal has jurisdiction to review.⁴⁷ There is therefore no simple way for a person who is denied eligibility for VAD on the basis that they are not a 'permanent resident' to appeal from this decision.⁴⁸

The absence of a mechanism for tribunal review is unfortunate, given the absence of a definition of the term 'permanent resident' in all states except Queensland. It is also unfortunate that the Victorian and South Australian governments appear to be narrowly interpreting the term as requiring a person to hold a permanent resident

42 Personal Communication with Jess, VEVO Helpdesk, Department of Home Affairs (Katrine Del Villar, Email, 21 September 2021) ('Personal Communication with VEVO Helpdesk'). Information obtained in response to an FOI request suggests the VEVO system is capable of displaying the visa details of these categories of visa, but that visas were not automatically recorded until November 2020: Department of Home Affairs, *FOI Response* (FA 21/09/00473 R1, 11 November 2021).

43 'Request an Electronic Visa Record', *Department of Home Affairs* (Web Page, 3 June 2022) <<https://immi.homeaffairs.gov.au/visas/permanent-resident/evidence-of-residency-status/request-an-electronic-visa-record>>.

44 These are recorded in the VEVO system operated by the Department of Home Affairs: Voluntary Assisted Dying Review Board, *Report of Operations: January – June 2020* (Report No 3, August 2020) 6 ('VADRB Report 3').

45 Ibid.

46 *VADRB Report 4* (n 22) 15; *VADRB Report 2* (n 22) 7, 9.

47 *VAD Act* (SA) (n 4) s 85(1); *VAD Act* (Vic) (n 1) s 68(1); *VAD Act* (WA) (n 2) s 84(1).

48 *YSB* (n 21) [1]–[5], [13], [25]–[27] (Quigley P).

visa granted under Commonwealth migration law,⁴⁹ and this interpretation has already caused problems in practice (which will be described in Part III below). In the parliamentary debate on the Voluntary Assisted Dying Bill in Victoria in 2017, Leader of the Government in the Legislative Council Gavin Jennings explained that review was not necessary for certain eligibility criteria 'because these decisions are based on clinical judgements and it is inappropriate for VCAT to make these clinical assessments'.⁵⁰ This is certainly the case for criteria such as whether a disease or medical condition is 'incurable',⁵¹ 'advanced' and 'progressive',⁵² or whether a person's medical prognosis is that death is expected within six months (or 12 months if the condition is neurodegenerative).⁵³ However, whether a person is a 'permanent resident' of Australia is clearly not a matter of 'clinical judgment' to be made by a medical practitioner.

III PROBLEMS CAUSED BY THE CURRENT INTERPRETATION OF 'PERMANENT RESIDENT' IN VICTORIA

Although VAD laws have been passed in all six Australian states, they have been operating in only two states at the time of writing: Victoria and Western Australia.⁵⁴ Despite being so new, there is evidence that problems have already arisen in several cases in Victoria because of the narrow definition of 'permanent resident' currently being used. This section will outline the nature and extent of the problem that this criterion has caused in Victoria since the *Voluntary Assisted Dying Act 2017* (Vic) ('*VAD Act* (Vic)') commenced operation.

The requirement to be an Australian citizen or permanent resident affects two main categories of person:

- long-term Australian residents who never formally applied for Australian citizenship; and
- New Zealand citizens, who are entitled to reside in Australia indefinitely, but do not hold permanent residency.

It also affects individuals who are Australian citizens or permanent residents but lack the paperwork to prove it.

49 See above nn 38–45 and accompanying text. As described above, although not conclusive, the *Victorian VAD Guidance* seems to suggest a person must prove they possess a permanent resident visa granted under Commonwealth migration law.

50 Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2017, 5942 (Gavin Jennings).

51 *VAD Act* (Vic) (n 1) s 9(1)(d)(i).

52 *Ibid* s 9(1)(d)(ii).

53 *Ibid* ss 9(1)(d)(iii), (4).

54 As of July 2022, the *VAD Act* (Vic) (n 1) has been operational for three years and the *VAD Act* (WA) (n 2) for one year.

A Former ‘British Subjects’

Many immigrants to Australia prior to 1987 did not formally apply for Australian citizenship or permanent residence. The concept of ‘Australian citizen’ did not even exist until 1949.⁵⁵ Before that time, an Australian national held the status of a ‘British subject’,⁵⁶ reflecting Australia’s concept of itself as a dominion of the United Kingdom, rather than an independent, self-governing, sovereign country. From 1949 to 1 May 1987, there were two national legal statuses in Australia: an ‘Australian citizen’ and a ‘British subject’ (a person who was a citizen of another Commonwealth country), with both enjoying all the rights and responsibilities of Australian citizenship.⁵⁷

After 1987, references to ‘British subject’ were removed from Commonwealth legislation.⁵⁸ This meant British subjects who had not formally become Australian citizens ‘lost their “privileged” status’.⁵⁹ Those who wished to travel outside Australia required a passport or a returning resident visa to re-enter Australia, and thus would have applied for either Australian citizenship or permanent residency.⁶⁰ However, immigrants who have resided in Australia for decades without leaving

- 55 The concept came into existence when the *Nationality and Citizenship Act 1948* (Cth) came into effect. See Rayner Thwaites, *Report on Citizenship Law: Australia* (Country Report No 2017/11, May 2017) 2; Kim Rubenstein and Jacqueline Field, *Australian Citizenship Law* (Lawbook, 2nd ed, 2017) 15–16.
- 56 *Singh v Commonwealth* (2004) 222 CLR 322, 364–5 [96] (McHugh J), 402 [214] (Kirby J) (‘*Singh*’). In Victorian law, the term ‘British subject’ refers to a person who was enrolled to vote in Victoria, the Commonwealth, Australian Capital Territory (‘ACT’) or Northern Territory within the three months prior to 26 January 1984, or would have been eligible to enrol to vote had they been over 18 at that date: *Interpretation of Legislation Act 1984* (Vic) s 55(2).
- 57 Rubenstein and Field (n 55) 118–19. Rubenstein and Field notes that during this period, references in Commonwealth law to a ‘British subject’ were to be read as including references to an ‘Australian citizen’: at 119, discussing *Australian Citizenship Act 1948* (Cth) s 51. After 1969, Australian citizenship was accorded priority among these two statuses: a person was referred to as an Australian citizen having ‘the status of a British subject’: *Citizenship Act 1969* (Cth) s 7.
- 58 Amendments to the *Australian Citizenship Act 1948* (Cth) were made by the *Australian Citizenship Amendment Act 1984* (Cth) s 33, which came into effect from 1 May 1987. See *Singh* (n 56) 402 [214] (Kirby J).
- 59 Rubenstein and Field (n 55) 119. There was a minority view that ‘British subjects’ constituted a residual category: that is, ‘non-citizen, non-alien British subject’ or ‘Australian nationals without the need of citizenship’ who were permanent residents by becoming absorbed into the Australian community: *Singh* (n 56) 417 [265] (Kirby J). See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 47 [48] (McHugh J), 69 [117] (Kirby J), 77 [146], 78–9 [151]–[154] (Callinan J). See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 410 [44] (Gaudron J), 492 [304] (Kirby J). That view has not prevailed. Vestiges of the status of ‘British subject’ remain in certain Victorian laws. For example, British subjects are entitled to be enrolled as an elector for the Victorian Legislative Council and Legislative Assembly: *Constitution Act 1975* (Vic) s 48(1)(a)(ii); are qualified to be a local Councillor: *Local Government Act 2020* (Vic) s 34(1)(b); and can work as a police reservist: *Police Regulation (Pensions) Act 1958* (Vic) s 104(c).
- 60 Section 42(1) of the *Migration Act 1958* (Cth) (‘*Migration Act*’) requires every non-citizen travelling into Australia to have a visa, unless a relevant exemption applies (for example, New Zealand citizens travelling on a New Zealand passport: at s 42(2A)(a)).

may not have needed to consider their status, or apply to formally become an Australian citizen or permanent resident, until they become terminally ill and make an application for VAD.⁶¹

It is not clear how many long-term residents of Victoria, Western Australia and South Australia are former British subjects who never applied for Australian citizenship or permanent residence. However, there is evidence that this issue has already arisen in practice. The Coroners Court of Victoria and VCAT have already determined two cases where long-term Australian residents who were British citizens applied for VAD but were rejected on the basis that they were not 'permanent residents' (discussed in Parts III(C) and III(D)).⁶² Medical practitioners also report other instances of people who were determined to be ineligible for VAD on this basis (see Part III(E) below). Although in some cases it might be possible for the person to apply for Australian citizenship or permanent residency, this is a time-consuming, complex, and expensive process which is unlikely to be embarked upon by a person who is at the end of their life.

B New Zealand Citizens

The 'permanent resident' requirement also negatively affects long-term Australian residents who are New Zealand citizens. Under a reciprocal arrangement, New Zealanders have the right to reside in Australia indefinitely. If they hold a valid New Zealand passport and are neither a 'behaviour concern' nor a 'health concern',⁶³ they are granted a special category visa ('SCV') (subclass 444), which allows them to study, work, and access healthcare in Australia under Medicare, and pay taxes in Australia.⁶⁴ However, legally, an SCV is designated a 'temporary' class of visa,⁶⁵ so long-term residents on an SCV are not formally considered to be 'permanent residents' of Australia.

There are many New Zealand citizens who are long-term residents of Australia on this class of temporary visa. According to the most recent statistics, there were 634,250 New Zealand citizens who were resident in Australia for 12 months or more on an SCV.⁶⁶ Although the majority of these residents will not have a terminal

61 See *VADRB Report 3* (n 44) 6; *VADRB Report 4* (n 22) 15.

62 *Bareuther Finding* (n 21); *YSB* (n 21).

63 *Migration Act* (n 60) s 32(2).

64 *Migration Regulations 1994* (Cth) reg 2.01(2) item 1 ('*Migration Regulations*'); 'Subclass 444 Special Category Visa (SCV)', *Department of Home Affairs* (Web Page, 21 September 2023) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444>>.

65 A special category visa is classified as Special Category (Temporary) (Class TY): *Migration Regulations* (n 64) regs 2.01(2) item 1, 5.15A.

66 Of these, 20.7% (or 131,289 people) were resident in Victoria, 15.5% were resident in Western Australia, and 2.2% in South Australia. These statistics were from Census night 2016: Australian Bureau of Statistics, *Insights from the Australian Census and Temporary Entrants Integrated Dataset* (Catalogue No 3419.0, 14 February 2019).

illness or wish to access VAD, the sheer number of people involved demonstrates that this will be a significant issue of practical importance for some of these people.

The definition of ‘permanent resident’ in Queensland expressly includes New Zealand SCV holders.⁶⁷ As mentioned in Table 1 above, in NSW and Tasmania, those who have resided in Australia for at least three consecutive years will also be eligible to apply for access to VAD.⁶⁸ However, New Zealanders who reside in Victoria, Western Australia, or South Australia may be excluded from accessing VAD if a narrow definition of the term ‘permanent resident’ is taken which requires a person to possess a ‘permanent visa’.

Soon after the *VAD Act* (Vic) commenced operation, it was reported that terminally ill Victorians were ineligible to access VAD because they were neither Australian citizens nor permanent residents, or ‘because they don’t have key identity documents’.⁶⁹ Some cases were formally considered by courts and tribunals,⁷⁰ and other reports emerged from medical practitioners participating in VAD. This evidence is considered below.

C ‘British Subject’ Ruled Ineligible: Suicide of Julian Bareuther

Within the first three months of VAD being legalised in Victoria, a tragic case arose concerning an elderly, terminally ill man who had been a resident in Victoria for nearly 40 years,⁷¹ but had not formally become either an Australian citizen or ‘permanent resident’.⁷² Julian Bareuther was a United Kingdom citizen who migrated to Australia some forty years ago, when he was in his twenties. At that time, British citizens had the status of British subjects in Australia and enjoyed all the rights of Australian citizens.⁷³ After he became terminally ill with ‘inoperable pancreatic cancer’,⁷⁴ which was causing ‘pain, nausea, wasting and debility’,⁷⁵ he consulted general practitioner Dr Nick Carr about accessing VAD.⁷⁶ When Dr Carr discovered Bareuther had never taken out Australian citizenship, he explored in depth whether he might still be eligible for VAD, but ultimately concluded that he

67 *VAD Act* (Qld) (n 5) ss 10(1)(e), (2).

68 *VAD Act* (NSW) (n 6) s 16(1)(b)(iii); *EOLC Act* (Tas) (n 3) s 11(1)(a)(iii).

69 Cunningham (n 23).

70 *Bareuther Finding* (n 21); *YSB* (n 21).

71 *Bareuther Finding* (n 21) [1]; Nick Carr, ‘Choosing When to Go: What the Nation Can Learn from Victoria’s Embrace of Voluntary Assisted Dying’, *Crikey* (online, 18 June 2020) <<https://www.crikey.com.au/2020/06/18/voluntary-assisted-dying-laws-one-year-on/>>.

72 *Bareuther Finding* (n 21) [1].

73 See above nn 55–57 and accompanying text.

74 *Bareuther Finding* (n 21) [2].

75 Carr (n 71).

76 *Bareuther Finding* (n 21) [9].

was not eligible.⁷⁷ Within a week,⁷⁸ Bareuther committed suicide through plastic bag and nitrogen gas asphyxiation.⁷⁹ The Coroners Court of Victoria conducted an investigation into the death. The coroner quoted at length from a statement from Dr Carr:

I personally was immensely distressed when I heard that Julian had killed himself. Here was a lonely man, dying of a horrible cancer, who sought my legitimate help. He was an Australian in every sense but a technical one, a previous taxpayer, a current Centrelink recipient and on the Electoral Roll. Because of this citizenship technicality, he was denied VAD. I had to tell him that I was unable to help him in the only way he wanted and as a result he ended up committing suicide. I do not believe that this was what any of those who framed the law would have wanted to happen.⁸⁰

Coroner Phillip Byrne noted he 'found it difficult not to feel sympathy for Mr Bareuther's plight and wonder[ed] whether there could be built into the process some level of discretion', although he stopped short of issuing a formal recommendation to this effect.⁸¹

D Ineligible Long-Term Resident: *YSB v YSB*

In 2020, VCAT heard another Victorian case involving a long-term resident who was held to be ineligible for VAD because he was not legally a 'permanent resident'. *YSB v YSB*⁸² involved a terminally ill man⁸³ (known as UQL) who was assessed by his doctors as eligible for VAD, but was denied a VAD self-administration permit on the basis that he was not an Australian citizen or permanent resident.⁸⁴ UQL, a citizen of the United Kingdom, had moved to New Zealand and eventually settled in Australia, where he had lived for about 15 years.⁸⁵ President Quigley noted that UQL 'has not been out of the country in over 10 years and not left the state of Victoria in two years. He has owned a house in Victoria for more than nine years.'⁸⁶ Although as a matter of ordinary language

77 Ibid [10].

78 Dr Carr's last telephone conversation with Bareuther was on 21 September 2019: *ibid*. Bareuther committed suicide on 24 or 25 September 2019: at [13].

79 Ibid [6].

80 Ibid [10]. See also Charlotte Mitchell, 'The "Extraordinary" Peace of Voluntary Assisted Dying', *HealthTimes* (online, 27 May 2021) <<https://healthtimes.com.au/hub/palliative-care/69/news/cm/the-extraordinary-peace-of-voluntary-assisted-dying/5854/>>.

81 *Bareuther Finding* (n 21) [11]. Note that in Queensland such discretion exists: the legislation permits a person to apply for an exemption from the Australian citizenship or permanent residency requirement if there is a 'substantial connection' to Queensland and there are compassionate grounds: *VAD Act* (Qld) (n 5) s 12.

82 *YSB* (n 21).

83 Ibid [18].

84 Ibid [2].

85 Ibid [3].

86 Ibid.

UQL was permanently resident in Australia, under federal migration law he held only a temporary resident visa, albeit one which authorised him to stay indefinitely.

UQL's doctor (YSB) brought proceedings before VCAT challenging the denial of a VAD permit. Although Quigley P acknowledged 'the disappointment and despair that this decision causes UQL and those who care for him and support him',⁸⁷ she held that VCAT did not have jurisdiction to review the decision.⁸⁸ The lack of tribunal review of this issue deprives individuals of an expeditious and inexpensive avenue to challenge the governmental interpretation of the term 'permanent resident'. To date, the interpretation of the *Victorian VAD Guidance* as requiring a person to meet the technical legal test contained in migration law rather than the ordinary meaning of the term 'permanent resident' as understood by UQL's medical practitioners remains untested in the courts.

E Ineligible Due to Difficulties Finding Paperwork

In addition to those who are not 'permanent residents' being denied access to VAD, several cases have been reported of people who lack the necessary paperwork to prove their residency status. The VAD Review Board has reported from the outset that: 'Some people have found it difficult to prove they are an Australian citizen/permanent resident who has lived in Victoria for at least 12 months.'⁸⁹ Within the first three months of the Act's commencement, general practitioner Dr Carr reported two cases of women in the final stages of cancer who approached him seeking access to VAD.⁹⁰ Neither was able to demonstrate eligibility because they were unable to provide paperwork proving they were permanent residents of Australia.⁹¹

One case involved a woman (whom we shall call 'Janet') who was in the final stages of cancer. Janet was born in the United Kingdom, but had lived in Victoria for 55 years and had been a permanent resident in Australia since 1961.⁹² Although she was an Australian pensioner and registered to vote, she was unable to find her permanent resident visa documentation, and hence could not prove her eligibility.⁹³ Dr Carr stated that:

This is someone who is eligible in every sense except a demographic technicality. ... She's too tired and too unwell to overcome these bureaucratic barriers ... She's resigned to the fact that she's not going to be able to access voluntary assisted dying.

87 Ibid [30].

88 Ibid [24]–[25]. VCAT's jurisdiction to review is conferred by the *VAD Act* (Vic) (n 1) s 68. It includes the criterion that a person is 'ordinarily resident in Victoria for at least 12 months at the time of making a first request', but not the criterion that a person is an 'Australian citizen or permanent resident'.

89 *VADR B Report 2* (n 22) 7.

90 Cunningham (n 23).

91 Ibid.

92 Ibid.

93 Ibid.

That's a terrible and tragic outcome because these very laws were put in place to help people like her.⁹⁴

Dr Carr's second example was an elderly woman (whom we shall call 'Alice') living in a nursing home. Alice had 'misplaced her birth certificate and [did] not have a current driver's licence or passport'.⁹⁵ Without these documents, she was unable to prove her Australian citizenship. This situation is not uncommon. Dr Cameron McLaren, a medical practitioner who has reported providing VAD in a number of cases, has also observed that some patients die during the VAD application process 'while we frantically search for birth certificates'.⁹⁶ A person who is dying 'will need to apply to the Department of Births, Deaths, and Marriages for a new birth certificate, which will take two weeks. By then, the first assessment will be more than seven days old and will be invalid and need to be repeated'.⁹⁷

Although Alice was an Australian citizen, and Janet was a permanent resident, neither had documentation to prove this status. These cases resonate with qualitative research on the early Victorian experience. A study interviewing 32 doctors who had participated in VAD during its first year of operation identified difficulties in obtaining the documentation necessary to prove Australian citizenship or permanent residency,⁹⁸ citing the advanced age of the patient,⁹⁹ that the end of life is 'a chaotic time for many people',¹⁰⁰ or that a person with a terminal illness may have thrown out their paperwork.¹⁰¹ Doctors perceived that the residence and citizenship requirements either 'effectively locked out patients who had lived in Victoria throughout their adult lives but could not provide documentary proof of these requirements' or caused delays through compiling the necessary documentary evidence.¹⁰²

94 Ibid.

95 Ibid.

96 Cameron McLaren, 'An Update on VAD: (Almost) a Year in Review', *Dying with Dignity Victoria* (Web Page, 16 June 2020) 2 <http://www.dwdv.org.au/wp-content/uploads/2020/07/One_Year_of_VAD-Dr_Cameron_McLaren.pdf>. The *VAD Act* (Vic) (n 1) s 21(2) requires the first assessment report form (including a determination of eligibility on the ground of citizenship or permanent residence) to be given to the VAD Review Board within 7 days of the first assessment: see at sch 1.

97 McLaren (n 96) 4.

98 Willmott et al (n 23) 127. See Jodhi Rutherford, Lindy Willmott and Ben P White, 'What the Doctor Would Prescribe: Physician Experiences of Providing Voluntary Assisted Dying in Australia' (2023) 87(4) *OMEGA — Journal of Death and Dying* 1063 for a separate study (conducted between July 2019 to February 2020) which did not report on the issue of proof of Australian citizenship or permanent residence. It comprised 'semi-structured interviews with 25 Victorian doctors with no in-principle objection to legalised VAD': at 1063.

99 Willmott et al (n 23) app 'Supporting Information: Supplementary Methods and Results' 9, evidence of (15_GP) <<https://doi.org/10.5694/mja2.51123>> ('*Willmott Appendix*').

100 Willmott et al (n 23) 127.

101 *Willmott Appendix* (n 99) 9, evidence of (11_GP).

102 Willmott et al (n 23) 127.

IV INTERPRETATION OF ‘PERMANENT RESIDENT’ IN THE VAD LAWS

Having described the problems caused in practice by the eligibility criterion that a person must be ‘an Australian citizen or permanent resident’,¹⁰³ we next consider whether as a matter of law the phrase should be considered to require proof of a person’s citizenship or visa status, or whether alternative interpretations may be justifiable.

This section commences by considering the plain reading of the relevant text in Part IV(A), and then examines the various contexts in which it has been used (Commonwealth migration and citizenship law, as well as three definitions of the term taken from other state laws) (Part IV(B)). Finally, in Part IV(C) we consider extrinsic material discussing the purpose of the inclusion of the residence criteria.¹⁰⁴

A Text

According to established principles, statutory interpretation begins with a close reading of the text of the statutory provision to determine its ‘ordinary and natural’ meaning.¹⁰⁵ In relation to the criterion in question, neither the term ‘Australian citizen’ nor the term ‘permanent resident’ is defined in the *VAD Act* (Vic), the *Voluntary Assisted Dying Act 2019* (WA) (*VAD Act* (WA)) or the *Voluntary Assisted Dying Act 2021* (SA) (*VAD Act* (SA)).¹⁰⁶

The *Oxford English Dictionary* defines a ‘citizen’ as ‘[a] legally recognized subject or national of a state, commonwealth, or other polity, either native or naturalized, having certain rights, privileges, or duties’.¹⁰⁷ No definition of ‘permanent resident’ is provided by the *Oxford English Dictionary*. The noun ‘resident’ (without the adjective ‘permanent’) is relevantly defined as ‘[a] person who resides permanently in a place; a permanent or settled inhabitant of a town, district, etc’.¹⁰⁸

Comparing the dictionary definitions, then, suggests that a ‘citizen’ of Australia is a person who possesses a formal, legally recognised status, accompanied by rights

103 *VAD Act* (SA) (n 4) s 26(1)(b)(i); *VAD Act* (Vic) (n 1) s 9(1)(b)(i); *VAD Act* (WA) (n 2) s 16(1)(b)(i).

104 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (*Project Blue Sky*); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ). See also *Interpretation of Legislation Act 1984* (Vic) s 35(a) (*IL Act*).

105 *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J).

106 As discussed above, ‘permanent resident’ is defined in Queensland, and includes the holder of a permanent resident visa under the *Migration Act* (n 60) s 30(1), as well as New Zealand citizens who are resident in Australia on a subclass 444 SCV: *VAD Act* (Qld) (n 5) s 10(2).

107 *Oxford English Dictionary* (online at 2 September 2021) ‘citizen’ (n, def 2a).

108 *Ibid* ‘resident’ (n¹, def 1a).

and duties, which inhere in the person regardless of whether they currently reside in Australia or not. By contrast, the term 'permanent resident' is less concerned with a person's formal legal status and more with the fact that a person has lived in Australia on a long-term, permanent, or settled basis.

This plain reading of the text of the legislation may be the appropriate meaning to give to the phrase 'permanent resident' in the VAD legislation (and we argue for this approach in Part IV(D) below). It may be supplemented or contradicted by recourse to materials setting out the context and purpose of the phrase.

B Context

The phrase 'Australian citizen or permanent resident' is used only once in state VAD laws, as one of the eligibility criteria.¹⁰⁹ As the component terms are not defined in any VAD laws except in Queensland,¹¹⁰ nothing in the legislation itself provides context to guide the interpretation of the phrase.

Unfortunately, other state laws provide scant guidance as to the intended meaning of 'permanent resident' when used in the VAD laws. The majority of state laws using the composite phrase 'Australian citizen or permanent resident' do not define 'permanent resident' at all.¹¹¹ Further, as is explained in Part IV(B)(3), those state laws which do define the term have taken inconsistent approaches to the meaning of 'permanent resident'.

Some state laws¹¹² adopt the narrow definition of 'permanent resident' contained in the *Migration Act 1958* (Cth) ('*Migration Act*') (which is outlined in Part IV(B)(1)).¹¹³ Other state laws¹¹⁴ adopt the slightly more inclusive definition contained in the *Australian Citizenship Act 2007* (discussed in Part IV(B)(2)). Both these definitions are narrower than the plain English meaning of the term discussed in Part IV(A) above. A further class of state laws, dealing with eligibility for first

109 *VAD Act* (SA) (n 4) s 26(1)(b)(i); *VAD Act* (Vic) (n 1) s 9(1)(b)(i); *VAD Act* (WA) (n 2) s 16(1)(b)(i). See *VAD Act* (NSW) (n 6) ss 16(1)(b)(i)–(ii); *VAD Act* (Qld) (n 5) ss 10(1)(e)(i)–(ii); *EOLC Act* (Tas) (n 3) ss 11(1)(a)(i)–(ii).

110 *VAD Act* (Qld) (n 5) s 10(2).

111 See, eg, *South Australian Multicultural Act 2021* (SA) s 7(2); *Surrogacy Act 2019* (SA) ss 10(3)(c), (4)(c); *Transport (Compliance and Miscellaneous) Act 1983* (Vic) s 220DA(6) (definition of 'overseas student' para (a)) ('*Transport Act*'); *Crimes Act 1958* (Vic) s 464F(1); *Terrorism (Community Protection) Act 2003* (Vic) ss 13AZC(2)(c), 13AZE(b), 13AZT(2), 13ZFB, 13ZNB(2)(c), 13ZND(b); *Adoption Act 1994* (WA) s 55A(4)(a). These laws are set out in Table 4 below.

112 *Motor Vehicles Act 1959* (SA) s 97A(6) (definition of 'permanent resident'); *Transport Act* (n 111), interpreted in *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* [2013] VCAT 1839 ('*Khalid*').

113 The *Social Security Act 1991* (Cth) ('*Social Security Act*') also contains a definition of 'Australian resident', which means an Australian citizen, a permanent visa holder, or a New Zealand citizen who is a 'protected SCV holder': at s 7(2).

114 *Firearms Act 2015* (SA) s 4(1) (definition of 'permanent resident') ('*Firearms Act*').

home owner grants,¹¹⁵ have taken a wider and more inclusive approach than either Commonwealth law.

As none of these laws deals with a subject matter similar to VAD, and as the definition of ‘permanent resident’ varies greatly between different state laws, it remains unclear which definition is likely to have been intended in the context of eligibility for VAD.

1 ‘Permanent Resident’ in the Migration Act 1958 (Cth)

The *Migration Act* contains the narrowest conception of ‘permanent resident’. Although the term ‘permanent resident’ is not specifically defined, the *Migration Act* refers to a person with a ‘permanent visa’, which is circularly defined as a visa to remain indefinitely in the country.¹¹⁶ Some permanent visas are granted to people outside Australia (to travel to, enter and remain in Australia), and some are granted to people already within Australia (to remain in Australia, which may or may not entitle a person to leave and re-enter the country).¹¹⁷

Most straightforwardly, therefore, the term ‘permanent resident’ includes people with permanent visas listed in sch 1 of the *Migration Regulations 1994* (Cth). Classes of permanent resident visas¹¹⁸ include the family stream,¹¹⁹ work stream,¹²⁰ and business or investor stream.¹²¹ There are also permanent resident visas for asylum seekers¹²² and permanent protection visas,¹²³ as well as visas for

115 *First Home and Housing Construction Grants Act 2000* (SA) s 3 (definition of ‘permanent resident’) (*SA First Home Owners Act*); *First Home Owner Grant and Home Buyer Schemes Act 2000* (Vic) s 3(1) (definition of ‘permanent resident’) (*Victorian First Home Owners Act*); *First Home Owner Grant Act 2000* (WA) s 7B (*WA First Home Owners Act*).

116 *Migration Act* (n 60) s 30(1).

117 For examples of the latter class, see the absorbed person visas and ex-citizen visas granted by the *Migration Act* (n 60) ss 34–5.

118 Prescribed by *Migration Act* (n 60) s 31; *Migration Regulations* (n 64) reg 2.01. Schedule 1’s long list of visa classes is divided into four categories: permanent visas; temporary visas; bridging visas; and protection, refugee, and humanitarian visas.

119 These include visa classes 1108 Child (Migrant) (Class AH); 1108A Child (Residence) (Class BT); 1123A Other Family (Migrant) (Class BO); 1123B Other Family (Residence) (Class BU); 1124 Parent (Migrant) (Class AX); 1124A Aged Parent (Residence) (Class BP); 1124B Partner (Residence) (Class BS); 1129 Partner (Migrant) (Class BC); 1130 Contributory Parent (Migrant) (Class CA); 1130A Contributory Aged Parent (Residence) (Class DG); *Migration Regulations* (n 64) sch 1 pt 1 regs 1108–1108A, 1123A–1124B, 1129–1130A.

120 These include visa classes 1113 Global Talent (Class BX); 1114B Employer Nomination (Permanent) (Class EN); 1114C Regional Employer Nomination (Permanent) (Class RN): *ibid* sch 1 pt 1 regs 1113–1114C.

121 These include visa classes 1104BA Business Skills (Permanent) (Class EC); 1104B Business Skills (Residence) (Class DF); 1136 Skilled (Residence) (Class VB); 1137 Skilled—Independent (Permanent) (Class SI); 1138 Skilled—Nominated (Permanent) (Class SN): *ibid* sch 1 pt 1 regs 1104BA–1104B, 1136–8.

122 Visa class 1131 Territorial Asylum (Residence) (Class BE): *ibid* sch 1 pt 1 reg 1131.

123 *Migration Act* (n 60) s 35A(2).

returning permanent residents.¹²⁴ Table 2 summarises the classes of persons who are 'permanent residents' under the *Migration Act*. Importantly, New Zealand citizens on an SCV are not permanent residents: although they are entitled to remain in Australia indefinitely, SCVs are specifically designated as 'temporary' visas.¹²⁵

There are at least two other categories of permanent visas which are not included in the *Migration Regulations 1994* (Cth). One category which may potentially be relevant to long-term Australian residents applying for VAD is the 'absorbed person visas' ('APV') category.¹²⁶ APVs apply to non-citizens who were in Australia on 2 April 1984 and before that date had ceased to be an immigrant.¹²⁷ These people are taken to have been granted an APV on 1 September 1994.¹²⁸ This visa entitles the holder to remain in Australia indefinitely as a permanent resident, but not to re-enter the country.¹²⁹ An APV is granted automatically by operation of law, not by filling in an application form. If the person has not left Australia since 1990, there is unlikely to be a record of this visa in the VEVO system.¹³⁰ It is entirely possible that Julian Bareuther, having arrived lawfully in Australia in 1981, was the holder of an APV and hence a 'permanent resident' without his knowledge, at the time of his unsuccessful application for VAD in 2019. Nick Carr's patient 'Janet' probably also held this class of permanent residency, given she arrived in Australia in 1961.¹³¹

Another, possibly less relevant, class of permanent visa is an 'ex-citizen visa', which allows people who have ceased to be Australian citizens to remain in Australia as 'permanent residents'.¹³² Like an APV, an ex-citizen visa is a

124 Visa class 1128 Return (Residence) (Class BB): *Migration Regulations* (n 64) sch 1 pt 1 reg 1128.

125 *Migration Act* (n 60) s 32. This is despite the fact that a 'temporary visa' is defined as a visa to remain in Australia during a specified period, until a specified event happens, or while the holder has a specified status: at s 30(2). An SCV is statutorily described as a temporary visa despite not being subject to any of these limitations.

126 *Ibid* s 34.

127 The term 'immigrant' is not defined in the *Migration Act* (n 60). It was previously defined in s 5(1) to 'include persons entering Australia with permission' pursuant to a valid entry permit, and 'for the purpose of staying permanently': *Re Patterson* (n 59) 440 [144] (Gummow and Hayne JJ). That definition was repealed from 2 April 1984, by the *Migration Amendment Act 1983* (Cth) s 4(b): *Re Patterson* (n 59) 431 [119] (McHugh J), 443 [156] (Gummow and Hayne JJ).

128 *Migration Act* (n 60) s 34(2).

129 For more discussion of this visa class, see *Re Patterson* (n 59) 445 [161] (Gummow and Hayne JJ).

130 Personal Communication with VEVO Helpdesk (n 42).

131 Cunningham (n 23).

132 *Migration Act* (n 60) s 35. Most commonly, this applies to people who take out citizenship of another country which does not allow a person to retain dual citizenship, or when a person renounces their Australian citizenship to avoid hardship or detriment (for example, double taxation): *Australian Citizenship Act 2007* (n 28) s 33. A person can also lose their citizenship by

permanent visa granted by operation of law. A person may not be aware that they hold this visa, and it may not be recorded on the VEVO system.¹³³

Table 2: Classes of ‘Permanent Residents’ under the *Migration Act 1958* (Cth)

Legislation	Class of permanent resident	Meaning
<i>Migration Regulations 1994</i> (Cth) sch 1	Listed classes of ‘permanent resident’ visa ¹³⁴	Holder of a ‘permanent visa’: <ul style="list-style-type: none"> • family stream; • work stream; • business or investor stream; • asylum seeker; • returning permanent resident.¹³⁵
<i>Migration Act 1958</i> (Cth) s 35A(2)	Permanent protection visa	Previously known as Protection (Class XA) visa under the <i>Migration Regulations 1994</i> (Cth).
<i>Migration Act 1958</i> (Cth) s 34	Absorbed person visa	Person who was: <ul style="list-style-type: none"> • in Australia on 2 April 1984; and • had ceased to be an immigrant before that date; and • had not left Australia since 2 April 1984.
<i>Migration Act 1958</i> (Cth) s 35	Ex-citizen visa	Person who: <ul style="list-style-type: none"> • was formerly an Australian citizen • remains in Australia; and • has ceased to be a citizen.

2 ‘Permanent Resident’ in the Australian Citizenship Act 2007 (Cth)

The *Australian Citizenship Act 2007* has a slightly broader definition of ‘permanent resident’, including many New Zealand citizens who have been in Australia since at least 2001. Section 5 of the *Australian Citizenship Act 2007* defines ‘permanent resident’ to include two categories of person. The first category

committing fraud in a citizenship application: at s 34; or by committing certain terrorist offences: at ss 36B, 36D.

133 This point was made in Elibrict Karlsen, ‘Could People Stripped of Their Australian Citizenship Be Immediately Removed from Australia?’, *FlagPost* (Blog Post, 12 August 2015) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2015/August/Cessation_of_citizensip>.

134 Prescribed by *Migration Act* (n 60) s 31; *Migration Regulations* (n 64) reg 2.01. Schedule 1’s long list of visa classes is divided into four categories: permanent visas; temporary visas; bridging visas; and protection, refugee, and humanitarian visas.

135 *Migration Regulations* (n 64) sch 1 pt 1 reg 1128.

refers to persons holding a 'permanent visa',¹³⁶ which is defined to have the same meaning as in the *Migration Act*.¹³⁷ Therefore, it includes holders of the range of classes of permanent resident visas specified in sch 1 of the *Migration Regulations 1994* (Cth), as well as persons who are statutorily granted an APV, or an ex-citizen visa.

The second category of 'permanent resident' under the *Australian Citizenship Act 2007* is persons covered by a determination made by the Minister.¹³⁸ The current determination¹³⁹ under the *Australian Citizenship Act 2007* includes New Zealand citizens who are 'SCV holders'.¹⁴⁰ In essence, this means most New Zealand citizens¹⁴¹ who are resident in Australia will be considered 'permanent residents' within the meaning of the *Australian Citizenship Act 2007*,¹⁴² although for the purposes of the *Migration Act*, they remain temporary visa holders.

In addition to these categories, the Minister has determined that New Zealand citizens who are outside Australia but were formerly resident in Australia as SCV holders, including airline crew members, are taken to be 'permanent residents' for the purposes of the *Australian Citizenship Act 2007*.¹⁴³

Table 3: Classes of 'Permanent Residents' under the *Australian Citizenship Act 2007* (Cth)

Legislation	Class of permanent resident	Meaning
<i>Migration Regulations 1994</i> (Cth) sch 1	Listed classes of 'permanent resident' visa Absorbed person visa	Described in Table 2 above.

136 *Australian Citizenship Act 2007* (n 28) s 5(1)(a).

137 *Ibid* s 3 (definition of 'permanent visa').

138 *Ibid* ss 5(1)(c), (2).

139 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Australian Citizenship (Permanent Resident) Determination (LIN 22/103) 2022* (F2023C00537, 1 July 2023) ('*Determination*').

140 *Ibid* s 4. The definition of 'permanent resident' also includes certain persons present in Norfolk Island or the Cocos (Keeling) Islands: at s 7. However, these people will not be eligible for VAD under the *VAD Act* (Vic) (n 1), as they will not fulfil the 'ordinarily resident in Victoria for 12 months' criterion.

141 With the exception of a 'behaviour concern non-citizen' (convicted of one or more crimes and sentences to imprisonment for at least one year) and a 'health concern non-citizen' (suffering from tuberculosis which is not controlled): *Migration Act* (n 60) ss 5 (definitions of 'behaviour concern non-citizen' and 'health concern non-citizen'), 32(2)(a)(ii); *Migration Regulations* (n 65) reg 5.16.

142 *Determination* (n 139) s 4.

143 *Ibid* ss 5(2)–(3).

<i>Migration Act 1958</i> (Cth) ss 34, 35	Ex-citizen visa	
<i>Australian Citizenship Act 2007</i> (Permanent Resident), <i>Determination (LIN 22/103) 2022</i> (F2023C00537, 1 July 2023)	Special category visa holder	<ul style="list-style-type: none"> • Most New Zealand citizens resident in Australia • New Zealand citizens who are airline crew members and were previously in Australia on a special purpose visa ('SPV')

3 'Permanent Resident' in (Non-VAD) State Acts

As stated above, the term 'permanent resident' is rarely used in state legislation. When it is used, it is often not defined. Those statutes which do define the term have adopted three different positions: the *Migration Act* definition, the *Australian Citizenship Act 2007* definition, and a broader definition which includes New Zealand citizens who are resident in Australia. These various positions are summarised in Table 4.

Table 4: Alternative Definitions of 'Permanent Resident' in State Acts

Source	Definition	Legislation	Permanent resident requirement
Not defined	Unclear if: <ul style="list-style-type: none"> • Plain, ordinary meaning: 'a long-term, permanent or settled resident of a place'; or • Technical meaning in <i>Migration Act</i>; or • Technical meaning in <i>Australian Citizenship Act 2007</i>. 	<i>South Australian Multicultural Act 2021</i> (SA) s 7	Members of the Multicultural Commission must be Australian citizens or permanent residents.
		<i>Surrogacy Act 2019</i> (SA) ss 10(3)(c), (4)(c)	A surrogate mother and each intended parent must be an Australian citizen or permanent resident.
		<i>Transport (Compliance and Miscellaneous) Act 1983</i> (Vic) s 220DA(6)	Imposes conditions on overseas students in relation to student concessions on public transport, but not on an Australian citizen or a permanent resident.
		<i>Crimes Act 1958</i> (Vic) s 464F and <i>Terrorism (Community Protection) Act 2003</i> (Vic) ss 13AZC(2)(c), 13AZE, 13AZT(2), 13ZFB, 13ZNB(2)(c), 13ZND	A person detained for investigation of a crime or certain terrorism related offences may contact their consular office if they are not a 'citizen or permanent resident of Australia'.
		<i>Adoption Act 1994</i> (WA) s 55A	A person must be an Australian citizen or permanent resident to adopt a child.
<i>Migration Act</i> s 30(1)	<ul style="list-style-type: none"> • Holder of a 'permanent visa' 	<i>Motor Vehicles Act 1959</i> (SA) s 97A	One class of persons who may drive without a licence is a person who holds a foreign licence and is a permanent resident or citizen of Australia who has lived in the state for less than 3 months.

		<i>Transport (Compliance and Miscellaneous) Act 1983 (Vic)</i>	Concessional travel on public transport is restricted to Australian citizens and permanent residents.
<i>Australian Citizenship Act 2007</i> s 5	<ul style="list-style-type: none"> • Holder of a 'permanent visa' or • A person covered by a determination made by the Minister. 	<i>Firearms Act 2015 (SA)</i> ss 4(1) (definition of 'permanent resident'), 16	Where a firearms licence is held by a company, that company's principal nominee must be an Australian citizen or permanent resident.
First home buyer grants legislation	<ul style="list-style-type: none"> • Holder of a 'permanent visa' or • New Zealand citizen holding a 'special category visa'. 	<i>First Home and Housing Construction Grants Act 2000 (SA)</i> s 9 <i>First Home Owner Grant and Home Buyer Schemes Act 2000 (Vic)</i> s 9 <i>First Home Owner Grant Act 2000 (WA)</i> s 10	One criterion to apply for a first home owner grant is that the applicant must be an 'Australian citizen or permanent resident'.

The first possible interpretation — that found in the *Australian Citizenship Act 2007* (described in Part IV(B)(2)) — has been incorporated into a state Act dealing with firearms licences. Under this dual classification, a 'permanent resident' is either a permanent visa holder, or a New Zealand citizen who is an SCV holder or airline crew member who was previously an SPV holder.¹⁴⁴

A second possible interpretation is found in first home owner grant laws in all three states.¹⁴⁵ These laws define the term 'permanent resident' broadly, to mean either: (a) 'the holder of a *permanent visa* within the meaning of section 30(1) of the Migration Act 1958 of the Commonwealth'; or (b) 'a New Zealand citizen who is the holder of a *special category visa* within the meaning of section 32 of that

144 *Firearms Act* (n 114) ss 4(1) (definition of 'permanent resident'), 16.

145 *SA First Home Owners Act* (n 115) s 9; *Victorian First Home Owners Act* (n 115) s 9; *WA First Home Owners Act* (n 115) s 10. See also the *Land Tax Act 2005 (Vic)* s 3(1) (definition of 'Australian citizen or resident'), which adopts this definition in relation to the similar but not identical phrase 'Australian citizen or resident'.

Act'.¹⁴⁶ This definition is identical to that used in the *Voluntary Assisted Dying Act 2021* (Qld) ('*VAD Act* (Qld)'), the only Australian VAD law where the term 'permanent resident' is expressly defined.¹⁴⁷ It is also similar to the definition contained in the determination made under the *Australian Citizenship Act 2007*.

A third possible interpretation is the narrow definition of 'permanent visa holder' under the *Migration Act* (outlined in Part IV(B)(1) above). This definition has not been explicitly adopted in any state laws but was preferred by VCAT when interpreting a legislative provision concerning public transport concessions: *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* ('*Khalid*').¹⁴⁸ In that case, Muhammad Khalid, a university student who was a New Zealand citizen living with his family in Australia,¹⁴⁹ was denied concessional travel on public transport in Victoria because the concessions were restricted to 'Australian citizen[s]' and 'permanent resident[s]'.¹⁵⁰ Khalid argued that as an SCV holder he was a 'permanent resident', because 'a special category visa holder is entitled to live, work or study in Australia indefinitely'; and 'New Zealand citizens are entitled to many benefits in Australia such as Medicare, first home buyers' grants, paid parental leave, child care benefit and rebate, and subsidised tertiary education'.¹⁵¹ This argument was rejected by Garde P.¹⁵²

This narrow interpretation of the term 'permanent resident' in the *Transport (Compliance and Miscellaneous) Act 1983* (Vic) ('*Transport Act*') may have been justified in the context of transport concessions. This interpretation was consistent with the purpose of the *Transport Act*, which was to issue transport concessions only to permanent residents, not to short-term visitors like SCV holders.¹⁵³ Over 94% of SCV holders are tourists to or visitors in Australia,¹⁵⁴ and transport concessions would be of value to this large class of people as well as the comparatively smaller number of New Zealand citizens on SCVs who (like Khalid)

146 *Victorian First Home Owners Act* (n 115) s 3(1) (definition of 'permanent resident') (emphasis added). See also *SA First Home Owners Act* (n 115) s 3 (definition of 'permanent resident'); *WA First Home Owners Act* (n 115) s 7B.

147 *VAD Act* (Qld) (n 5) s 10(2) (definition of 'permanent resident').

148 *Khalid* (n 112). This case is the only reported case in which a court or tribunal has considered what meaning should be given to the term 'permanent resident' when it is not defined in the statute.

149 *Ibid* [1].

150 *Transport Act* (n 111) s 220DA(6). See also *ibid* [2]–[3].

151 *Khalid* (n 112) [47].

152 *Ibid* [73]–[86]. A proposed appeal to the Supreme Court from VCAT's decision did not proceed when the applicant failed to obtain a protective costs order to limit his liability to pay costs: *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* [2014] VSCA 115, [31]–[32] (Warren CJ and Santamaria JA).

153 See generally *Khalid* (n 112) [83].

154 President Garde referred to evidence that only 5–6% of New Zealanders arriving in Australia as SCV holders were permanent or long-term migrants, whereas the overwhelming majority were in Australia on short-term trips for holidays, business, or visiting family: *ibid* [81].

were residents in Australia. Adopting this definition was also consistent with the fact that several other terms in the *Transport Act* were ‘defined or significantly informed by the provisions of the *Australian Citizenship Act 2007*, the *Migration Act* or the *Regulations*’.¹⁵⁵

However, several aspects of Garde P’s interpretation of ‘permanent resident’ in this case counsel caution before uncritically applying this to other state laws containing the term. First, in *Khalid*, Garde P expressly adopted the definitions of ‘permanent resident’ in both the *Migration Act* and the *Australian Citizenship Act 2007*, considering that they have the same meaning — that is, a person who ‘has a permanent visa’. As is demonstrated in Tables 2 and 3, in fact the definitions in those two laws are not coextensive.¹⁵⁶ President Garde’s conflation of two different tests of ‘permanent resident’ leaves unresolved whether New Zealand citizens who are SCV holders could be ‘permanent residents’ for the purpose of accessing VAD or other state purposes.¹⁵⁷

Second, Garde P considered that the definition of ‘permanent resident’ which he had chosen ‘is consistent with the plain meaning of the expression’.¹⁵⁸ However, he did not refer to any dictionary definitions as evidence for this conclusion, and as explained above, it is clear that ‘a person holding a permanent visa’ is not the plain meaning of the term ‘permanent resident’.¹⁵⁹

Finally, Garde P considered that importing the classification of ‘permanent resident’ from migration and citizenship law was required to give clear criteria and legislative certainty.¹⁶⁰ In his view, it would be straightforward and simple to verify a person’s visa status by producing documentary proof,¹⁶¹ rather than involving complex discretionary criteria which may lead to variation and inconsistency between decision-makers.¹⁶² Ironically, Garde P’s decision in *Khalid* is itself productive of uncertainty, given it expressly adopts the definitions of ‘permanent resident’ in both the *Australian Citizenship Act 2007* and the *Migration Act* and

155 Ibid [71]. ‘The definition of “overseas student” is directed to holders of visas under the *Migration Act* and inevitably must import the visa classifications’: at [83]. The term ‘permanent resident’ occurred as one of five exceptions to the definition of ‘overseas student’, so logically should be interpreted by reference to the same legislation: at [75]. Other terms in the *Transport Act* (n 111) which are defined or informed by the *Australian Citizenship Act 2007* (n 28) or *Migration Act* (n 60) include: ‘Australian citizen’, ‘student with refugee status’, ‘overseas exchange student’, and ‘Australian Development scholarship’: *Khalid* (n 112) [71].

156 He stated that “[p]ermanent resident” is a term defined by s 5 of the [*Australian Citizenship Act 2007* (n 28)]: *Khalid* (n 112) [62]. He incorrectly added that that term has ‘the same meaning as in the *Migration Act*’: at [63].

157 This may be explicable on the basis that *Khalid* was not a protected SCV holder, so the issue did not arise on the facts of the case before VCAT.

158 *Khalid* (n 112) [84].

159 See Part IV(A).

160 *Khalid* (n 112) [85].

161 Ibid [86].

162 Ibid [85].

fails to resolve the status of New Zealand citizens who are SCV holders. It also ignores the fact that APV holders and holders of ex-citizen visas, who clearly qualify as 'permanent residents' under both the *Australian Citizenship Act 2007* and the *Migration Act*, may not be able to produce documentary evidence of their permanent residency in a straightforward manner.

In summary, the analysis in Parts IV(A) and IV(B) demonstrates that there are a number of different definitions of 'permanent resident' from which to choose, considering the text of the state VAD laws, dictionary definitions of the term, and the use of the term in other state Acts. These varying interpretations are set out in Table 5.

Table 5: Who is Included in Alternative Definitions of 'Permanent Resident'

Source	Definition	Classes of person included
Dictionary	<ul style="list-style-type: none"> • '[A] long-term, permanent or settled resident of a place'. 	<ul style="list-style-type: none"> • Any person living in a place on a long-term basis.
<i>Migration Act</i> s 30(1)	<ul style="list-style-type: none"> • Holder of a 'permanent visa' (entitles the person to remain in Australia indefinitely). 	<ul style="list-style-type: none"> • Holder of a 'permanent visa' registered on VEVO;¹⁶³ • holder of an 'absorbed person visa'¹⁶⁴ (resident in Australia prior to 2 April 1984); • holder of an 'ex-citizen visa'.¹⁶⁵
<i>Australian Citizenship Act 2007</i> s 5	<ul style="list-style-type: none"> • Holder of a 'permanent visa' or • a person covered by a determination made by the Minister. 	Identical to <i>Migration Act</i> , plus <ul style="list-style-type: none"> • New Zealand citizen holding an SCV; • New Zealand citizen who is an airline crew member and was previously in Australia on an SPV.¹⁶⁶

163 Issued under *Migration Regulations* (n 64) sch 1.

164 *Migration Act* (n 60) s 34.

165 *Ibid* s 35.

166 *Determination* (n 139) ss 4–5.

Transport concessions (<i>Khalid</i>) ¹⁶⁷	<ul style="list-style-type: none"> • Holder of a 'permanent visa' as defined in <i>both</i> the <i>Migration Act</i> and <i>Australian Citizenship Act 2007</i> 	<ul style="list-style-type: none"> • Identical to <i>Migration Act</i>. • Status of New Zealand citizen holding an SCV is unresolved.
First home buyer grants legislation	<ul style="list-style-type: none"> • Holder of a 'permanent visa' or • New Zealand citizen holding an SCV 	Identical to <i>Migration Act</i> , plus <ul style="list-style-type: none"> • New Zealand citizen holding an SCV.

Consideration of the context both within the VAD laws and within other state laws fails to clearly indicate which definition of 'permanent resident' should be preferred, and thus provides no definitive legislative guidance.

C Purpose

Given the lack of explicit definition of 'permanent resident' in the VAD laws in Victoria, South Australia, and Western Australia, and the various interpretations of 'permanent resident' contained in other state laws, it is necessary to consider whether the VAD Acts' purpose more clearly indicates the legislative intention regarding which interpretation is to be preferred.¹⁶⁸ It is a settled principle of statutory interpretation that a construction that promotes the purpose of an Act is preferable to a construction that would not promote that purpose.¹⁶⁹ The purpose of an Act may be evident from relevant provisions within the law setting out the legislation's purpose, as well as extrinsic material concerning the purpose of the 'permanent resident' criterion of eligibility. This includes parliamentary proceedings, the Explanatory Memorandum, and reports of parliamentary committees and other committees of inquiry.¹⁷⁰

1 Purpose Provisions in State VAD Laws

The expressed legislative purpose of the relevant state VAD laws is 'to provide for and regulate access to voluntary assisted dying'.¹⁷¹ Three of the principles of the legislation suggest that one of the primary reasons to provide VAD is to respect

167 *Khalid* (n 112).

168 *Project Blue Sky* (n 104) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

169 *IL Act* (n 104) s 35(a).

170 *Ibid* s 35(b). See also applying these principles to the construction of the *VAD Act* (Vic) (n 1): *YSB* (n 21) [23]–[27] (Quigley P).

171 *VAD Act* (Vic) (n 1) s 1(a). See the long title of the *VAD Act* (SA) (n 4) and the long title of the *VAD Act* (WA) (n 2).

autonomous choices made by people at the end of life.¹⁷² These choices ought to be respected equally; indeed, the first principle articulated in each VAD statute is that 'every human life has equal value'.¹⁷³ Promoting this purpose would not favour a restrictive view of the term 'permanent resident', such as that contained in the *Migration Act*, which includes those long-term residents with permanent visas but excludes others, such as New Zealand citizens resident in Australia. Instead, this purpose would be fostered by adopting a 'plain meaning' or dictionary definition of 'permanent resident' that respects the autonomy and choices of all long-term settled residents of Victoria.

Another relevant statutory principle is that VAD should occur, where possible, in the context of a therapeutic relationship with a person's health practitioner.¹⁷⁴ It is consistent with this purpose to exclude short-term SCV holders (tourists and visitors) from the definition of 'permanent residents', as they would not have the necessary ongoing therapeutic relationship with a health practitioner in Australia. This suggests that the expanded definition of 'permanent resident' contained in the first home owner grant legislation, which includes all temporary visitors from New Zealand on SCVs,¹⁷⁵ is probably not appropriate in the context of VAD.¹⁷⁶ This would be contrary to two of the principal reasons for introducing residency criteria: to provide VAD in the context of a therapeutic relationship, and to prevent VAD tourism (discussed below in Part IV(C)(2)).¹⁷⁷

2 Purposes in Extrinsic Material

Extrinsic material from Victoria provides more specific information concerning the purpose of including the 'permanent resident' requirement.¹⁷⁸ Both the

172 '[A] person's autonomy should be respected': *VAD Act* (SA) (n 4) s 8(1)(b); *VAD Act* (Vic) (n 1) s 5(1)(b). See *VAD Act* (WA) (n 2) s 4(1)(b). Persons 'are entitled to genuine choices regarding their treatment and care': *VAD Act* (SA) (n 4) s 8(1)(h); *VAD Act* (Vic) (n 1) s 5(1)(h). See *VAD Act* (WA) (n 2) s 4(1)(h). A person's individual values and preferences 'should be encouraged and promoted': *VAD Act* (SA) (n 4) s 8(1)(f); *VAD Act* (Vic) (n 1) s 5(1)(f); *VAD Act* (WA) (n 2) s 4(1)(f).

173 *VAD Act* (SA) (n 4) s 8(1)(a); *VAD Act* (Vic) (n 1) s 5(1)(a); *VAD Act* (WA) (n 2) s 4(1)(a).

174 *VAD Act* (NSW) (n 6) s 4(1)(e); *VAD Act* (SA) (n 4) s 8(1)(e); *EOLC Act* (Tas) (n 3) s 3(2)(e); *VAD Act* (Vic) (n 1) s 5(1)(e); *VAD Act* (WA) (n 2) s 4(1)(e). This principle is not included in the *VAD Act* (Qld) (n 5).

175 *SA First Home Owners Act* (n 115) s 3 (definition of 'permanent resident' para (b)); *Victorian First Home Owners Act* (n 115) s 3(1) (definition of 'permanent resident' para (b)); *WA First Home Owners Act* (n 115) s 7B(1)(a)(ii).

176 Evidence given in *Khalid* (n 112) suggests that 94% of SCV holders are not long-term residents: at [81].

177 New Zealand has also legislated to permit VAD under certain conditions, thus alleviating the need for New Zealand citizens to visit Victoria to access VAD: the *EOLC Act* (NZ) (n 8) was approved by a majority of voters at a referendum in 2020 and entered into effect on 6 November 2021.

178 The purpose of including the 'Australian citizen or permanent resident' criterion does not appear to have been expressly stated in the second reading speeches or parliamentary debates in either

parliamentary debate on the Voluntary Assisted Dying Bill¹⁷⁹ and the Ministerial Advisory Panel's report¹⁸⁰ state that the purpose of the residence requirements is to prevent 'VAD tourists' — that is, residents of other states, territories or countries — coming to Victoria to access VAD.¹⁸¹ In Tasmania and South Australia, no reason was given for the residence requirement, which appears to have been adopted from the Victorian and Western Australian VAD laws.¹⁸²

When Victoria enacted the *VAD Act* (Vic) in 2017, it was the only Australian state to have such legislation,¹⁸³ and the risk of residents of other states travelling to Victoria to access VAD was real and significant.¹⁸⁴ As all six states have now enacted VAD laws of their own, the likelihood of interstate VAD tourism has greatly diminished.¹⁸⁵ The risk of international VAD tourists from countries without VAD laws remains, but the likelihood is low. In any event, the requirement that a person must be ordinarily resident in the relevant state for a minimum of 12 months¹⁸⁶ (which was added during parliamentary debate on the legislation in Victoria) will effectively prevent both interstate and international travellers from

Western Australia or South Australia. This is perhaps because the requirement was included in those states because their laws were modelled on the *VAD Act* (Vic) (n 1).

- 179 See Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2017, 3085 (Tim Pallas); Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 2017, 3253 (John Eren).
- 180 The Panel stated that '[t]he voluntary assisted dying legislation, if passed, will be Victorian legislation that is intended to apply to Victorian residents. It is therefore appropriate to require a person be resident in Victoria and an Australian citizen or permanent resident to access voluntary assisted dying': *Victorian Panel Report* (n 14) 56. See also *WA Panel Report* (n 35) 20.
- 181 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2948 (Jill Hennessy).
- 182 See generally Tasmania, *Parliamentary Debates*, Legislative Council, 13 October 2020, 124 (Michael Gaffney); South Australia, *Parliamentary Debates*, Legislative Council, 2 December 2020, 2348 (Kyam Maher).
- 183 In 1995, the Northern Territory passed the *Rights of the Terminally Ill Act 1995* (NT) which was the first law to authorise euthanasia in Australia (and, indeed, the world). However, this law was overturned by the Commonwealth government enacting the *Euthanasia Laws Act 1997* (Cth): at sch 1 item 2.
- 184 See Del Villar and Simpson (n 12) 998–9, citing cases such as Penelope Blume's suicide: Neville Shane Drumgold, Director of Public Prosecutions (ACT), *Police v O* (Statement of Reasons CC2019/3260, 28 June 2019) <https://www.dpp.act.gov.au/_data/assets/pdf_file/0007/1382353/Police-v-O-DPP-statement-of-Reasons.pdf>; and Max Bell's attempt to use the Northern Territory's euthanasia law in 1996: 'The Road to Nowhere', *Four Corners* (Australian Broadcasting Corporation, 1996).
- 185 The ACT and Northern Territory remain constitutionally prohibited from passing legislation permitting VAD. The *Euthanasia Laws Act 1997* (Cth) which prohibits the territories from legislating for euthanasia or assisted dying remains in force, despite numerous attempts to have it repealed.
- 186 *VAD Act* (NSW) (n 6) s 16(1)(c); *VAD Act* (Qld) (n 5) s 10(1)(f); *VAD Act* (SA) (n 4) ss 26(1)(b)(ii)–(iii); *EOLC Act* (Tas) (n 3) s 11(1)(b); *VAD Act* (Vic) (n 1) ss 9(1)(b)(ii)–(iii); *VAD Act* (WA) (n 2) s 16(1)(b)(ii).

accessing VAD in an Australian state.¹⁸⁷ The 12-month state residence requirement has rendered the 'Australian citizen or permanent resident' criterion¹⁸⁸ somewhat redundant to its original purpose.¹⁸⁹

Another possible, albeit unarticulated, purpose for including the citizenship and permanent residency criterion in the *VAD Act* (Vic) could be to restrict access to taxpayer-funded benefits to persons who have contributed to the local economy through taxation.¹⁹⁰ This was one of the stated purposes for the permanent residence requirement to qualify for the transport concessions considered in *Khalid*.¹⁹¹ If this were the purpose of the 'permanent resident' requirement, then the dictionary definition is best suited to promoting this purpose, as it does not exclude long-term settled residents who are or were taxpayers.

D Conclusions

On the basis of our analysis above, we believe that the ordinary and natural meaning of the term 'permanent resident' is the best interpretation of that term for

187 This separate criterion of eligibility was introduced as a legislative amendment during debate in the Victorian Legislative Council: Victoria, *Parliamentary Debates*, Legislative Council, 14 November 2017, 5818 (Gavin Jennings).

188 *VAD Act* (NSW) (n 6) s 16(1)(b); *VAD Act* (Qld) (n 5) ss 10(1)(e), 12(1)(a); *VAD Act* (SA) (n 4) s 26(1)(b)(i); *EOLC Act* (Tas) (n 3) s 11(1)(a); *VAD Act* (Vic) (n 1) s 9(1)(b)(i); *VAD Act* (WA) (n 2) s 16(1)(b)(i). The text of this criterion is set out in Table 1.

189 It is also worth noting that none of those international jurisdictions which impose a residence requirement stipulate that a person must be a citizen or permanent resident. In most US states and territories which allow assisted dying, a person must be a resident of that jurisdiction in order to request assistance to die, but no minimum period of residency is stipulated: *Washington Act* (n 8) § 70.245.040(1)(b); *End of Life Option Act*, Cal Health and Safety Code § 443.2(3) (West 2018); *Death with Dignity Act of 2016*, DC Code § 7-661.03(a)(1)(D) (2017); *Colorado End-of-Life Options Act*, Colo Rev Stat § 25-48-103(1) (2016); *Our Care, Our Choice Act*, 19 Haw Rev Stat §§ 327L-2, 327L-13 (2019); *Aid in Dying for the Terminally Ill Act*, NJ Stat Ann §§ 26:16-4, 26:16-11 (West, 2019), s 4(a); *Maine Death with Dignity Act*, 22 Me Rev Stat Ann § 2140.4 (2019). In Canada, a person must be eligible for health services funded by a government in Canada (that is, a resident or temporary resident) to be able to access medical aid in dying: *Criminal Code*, RSC 1985, c C-46, s 241.2(1)(a). The maximum waiting period which may be imposed to access health services is three months: *Canada Health Act*, RSC 1985, c C-6, s 11(1)(a). See also 'Medical Assistance in Dying', *Government of Canada* (Web Page, 30 June 2023) <<https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html>>, archived at <<https://perma.cc/K37M-BMNF>>. In Spain, a person must have either: (a) Spanish nationality; or (b) legal residence in Spain; or (c) a certificate of registration in Spanish territory greater than 12 months: *Spanish Euthanasia Act* (n 7) art 5(1)(a). Permanent residence is not a requirement in any of these jurisdictions.

190 This is articulated in more detail in Del Villar and Simpson (n 12) 1019–20.

191 *Khalid* (n 112) [49] (Garde P), quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 2007, 3201 (Lynne Kosky). See also *Khalid* (n 112) [49] Garde P, quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 2007, 3196 (Lynne Kosky), where it was noted that:

It is fair and reasonable to exclude visitors and temporary residents from receiving taxpayer-funded benefits (welfare schemes, health care et cetera), because their residency status is such that they do not participate in or contribute to the taxation scheme in the same way as long-term or permanent residents or Australian citizens.

the purpose of eligibility for VAD, having regard to the text, context, and purposes of the legislation. The reasons for this conclusion are summarised below.

It is a settled principle of statutory construction that the plain meaning of the words should be the starting point, interpreted in the context of the rest of the Act.¹⁹² In this case, the dictionary definition of a ‘permanent resident’ is a ‘long-term, permanent or settled resident of a place’. Nothing in the context of the state VAD legislation directly sheds light on the intended interpretation of the term ‘permanent resident’, as the term is used only once, and except in Queensland is not defined. The context of other state Acts using the term ‘permanent resident’ is also of limited assistance, as three different approaches were adopted in a variety of different contexts.¹⁹³ None of those contexts (first home owner grants, firearms licences, or transport concessions) are directly analogous to VAD. Health services such as VAD are not usually considered incidents of citizenship, but are services required because human beings are susceptible to disease, suffering and death.

However, considerable assistance can be gained by considering the express legislative purposes of including the ‘permanent resident’ criterion in state VAD laws, as well as extrinsic material referring to the purpose of the criterion. The state VAD laws relevantly include the purposes of respecting autonomous choices and providing access to VAD within the context of a therapeutic relationship. Consistent with these purposes, temporary visitors (such as tourists) who lack a therapeutic relationship with local medical practitioners should not be eligible to access VAD.¹⁹⁴ On the other hand, those living in a state and accessing healthcare there should not be denied access to VAD. Defining the term ‘permanent resident’ restrictively using either the *Migration Act* or the *Australian Citizenship Act 2007* interpretation prevents long-term residents without visas, such as Julian Bareuther and UQL, from accessing VAD. This outcome is contrary to the express legislative purposes of enabling VAD to occur as an autonomous choice within the context of a therapeutic relationship. The express legislative purposes thus favour the adoption of a plain English definition of ‘permanent resident’ as a long-term, permanent, or settled resident of Victoria.

In addition to these legislative purposes, extrinsic material suggests the primary purpose of the ‘Australian citizen or permanent resident’ criterion of eligibility is to prevent interstate and international VAD tourism. Adopting a plain English definition of the term ‘permanent resident’, requiring evidence that a person is a ‘long-term settled resident’ of Australia, is the most effective way to achieve this purpose. On this definition, requiring proof of a formal ‘permanent resident’ visa would not be justified, as this excludes not only VAD tourists, but also many long-

192 *Project Blue Sky* (n 104) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ), citing *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208, 213 (Barwick CJ) and *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

193 See above Part IV(B)(3).

194 Although it has been noted that, given the limited number of medical practitioners currently engaged in providing VAD, in practice a patient often does not have a therapeutic relationship with the VAD coordinating medical practitioner: see Del Villar and Simpson (n 12) 1038.

term Victorian residents from accessing VAD, such as Julian Bareuther, UQL, and Nick Carr's patient 'Janet', who had been resident in Victoria for 55 years.

The plain meaning of the term 'permanent resident' is also most apposite to achieve the implied purpose of restricting access to taxpayer-funded VAD services. A focus on the fact of residence (rather than the possession of formal visa documents) ensures that long-term Australian residents, who have contributed to the community and paid taxes, are not excluded from access to VAD merely because their migration status is irregular, or they are unable to locate the necessary visa documents.

The express and implied legislative purposes all clearly indicate that the ordinary, dictionary definition of the term 'permanent resident', applying to long-term settled residents of a place,¹⁹⁵ should be preferred, rather than the narrower definitions in the *Australian Citizenship Act 2007* or *Migration Act*. This would allow all long-term, settled residents of Victoria to exercise autonomous choice and access VAD within the context of ongoing therapeutic relationships where possible.¹⁹⁶ It would also be effective to prevent residents of other countries coming to Victoria to access VAD, and would ensure that taxpayer-funded services are restricted to those who have contributed to the community and the local economy through taxation.¹⁹⁷

If the definition of 'permanent resident' in either the *Migration Act* or the *Australian Citizenship Act 2007* is adopted, this will create arbitrary exclusions which are unrelated to any of the abovementioned purposes of legalising VAD. For example, British citizen Julian Bareuther may well have been eligible for VAD, having arrived in Australia in 1981 and therefore likely holding an APV, but fellow British citizen UQL would remain ineligible, having immigrated to Australia only around 2005.¹⁹⁸ Both have been long-term residents and contributors to the Australian community, and do not share any characteristics with the 'VAD tourists' the legislation intended to prevent. By focusing on whether a person has formally applied for Australian citizenship or permanent residence, both the *Migration Act* and *Australian Citizenship Act 2007* definitions are under-inclusive and will exclude some classes of long-term residents from accessing VAD.

Finally, the dictionary definition of 'permanent resident' has the considerable advantage of providing clear, workable criteria of eligibility, making it simpler to provide documentary evidence. This criterion must be assessed by the coordinating

195 In *Khalid* (n 112), Garde P considered that the plain meaning of the term 'permanent resident' is a person who holds 'a permanent visa': at [63]. However, no dictionaries were cited as authority for this proposition.

196 See purposes of the Act described above in Part IV(C)(1).

197 See above Part IV(C)(2).

198 *YSB* (n 21) [1]–[3].

and consulting medical practitioners as part of a VAD eligibility assessment.¹⁹⁹ Medical practitioners are not experts in migration or citizenship law, unlike the public servants assessing eligibility for transport concessions in *Khalid*. Whether a person is a long-term, settled resident of a state can be easily ascertained where the medical practitioner has an ongoing relationship with the person.²⁰⁰ In other cases, they will be able to determine it by reviewing the person's medical records, or from the fact of possessing a green Medicare card (a green Medicare card is issued to Australian citizens and permanent residents, including New Zealand citizens on SCVs who have settled in Australia).²⁰¹ These are matters within the clinical competence of medical practitioners, in contrast to the complex legal tests which need to be applied to determine whether a patient has 'permanent resident' visa status.

Being able to use a Medicare card or medical records as evidence of permanent residence would also avoid the unintended consequence of excluding permanent residents and citizens such as 'Janet' and 'Alice' who have lost or misplaced the relevant paperwork, such as passports, citizenship certificates etc.

By contrast, the definitions of 'permanent resident' in the *Migration Act* or the *Australian Citizenship Act 2007* do not provide clear, certain, and practically workable criteria. Both definitions are extraordinarily complex, as described in Tables 2 and 3 above. They require medical practitioners to consider whether a person holds a 'permanent resident' visa registered on VEVO, or holds an APV or ex-citizen visa which may not be included on VEVO. The *Australian Citizenship Act 2007* definition also requires medical practitioners to be aware of which classes of person are listed in the current legislative instrument, which is subject to frequent and not well-publicised amendment. By way of illustration, until 2022, the applicable determination listed New Zealand citizens holding a 'protected SCV', a technical legal status taken from social security law which requires application of multiple different rules depending on whether the person was

199 In discussing the proposed legislation in Victoria, medical practitioners were considered 'best placed' or 'best suited' to assess this requirement: *Victorian Panel Report* (n 14) 55–6. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2948 (Jill Hennessy); Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices* (Final Report, June 2016) 221 ('*Victorian Parliamentary Committee Report*').

200 Extrinsic material suggests that whether a patient is an Australian citizen or permanent resident was intended to be demonstrated 'through their established relationship with the patient, and/or if necessary through documentary evidence': *Victorian Parliamentary Committee Report* (n 199) 221 (emphasis added). See also *Victorian Panel Report* (n 14) 55.

201 A yellow Medicare card is for visitors from countries with reciprocal health card agreements, and a blue Medicare card is a visitor or interim card, for a person who has temporary residency and is applying for permanent residency — usually issued for a 12-month period: 'Medicare Benefits Schedule: Note AN.0.6', *Department of Health and Aged Care* (Web Page) <<http://www9.health.gov.au/mbs/fullDisplay.cfm?type=note&q=AN.0.6&qt=noteID>> ('Note AN.0.6'); 'Your Medicare Card', *Services Australia* (Web Page, 5 May 2023) <<https://www.servicesaustralia.gov.au/your-medicare-card?context=60092>>.

physically resident in Australia on or prior to 26 February 2001.²⁰² The current determination, by contrast, applies to most New Zealand citizens who hold an SCV. In many cases, it will be too complex for a medical practitioner to navigate the intricacies of citizenship or migration law to assess whether a person holds a 'permanent visa'. Further, as mentioned above, a determination by a medical practitioner or the Secretary of the Victorian Department of Health that a person is or is not a 'permanent resident'²⁰³ (which may be mistaken, as in the case of Julian Bareuther) is not reviewable.²⁰⁴

In summary, adopting a plain English definition of 'permanent resident' as a 'long-term, settled resident of a place' is consistent with both the overarching purposes of state VAD laws and the specific purposes of including the 'permanent resident' criterion.

V REFORM OPTIONS

We have concluded that the ordinary and natural meaning of the term 'permanent resident' should be preferred, and that VAD should be available to those persons who are long-term, settled residents of Australia. This section sets out three alternative ways in which this interpretation can be incorporated, to varying degrees, into the VAD laws in Victoria, Western Australia, and South Australia.

A *Expressly Adopt the Plain English Definition of 'Permanent Resident'*

It is clearly undesirable to have a key term such as 'permanent resident' undefined in the VAD laws when, as Table 5 demonstrates, there are numerous possible alternative definitions of this term. Ideally, clear legislative guidance should be provided through a statutory definition of 'permanent resident', thus removing the confusion. We would recommend including a definition that reflects the ordinary and natural meaning of the term, such as the following:

A '*permanent resident*' is a person who has settled in Australia and lives in the country on a long-term or ongoing basis, and is not in the country temporarily, for example as a visitor or tourist.

Policy documents could then state that possible documents to verify permanent residence include that a person holds a green Medicare card (which entitles them to full Australian healthcare). A person can receive a green Medicare card if they

202 Minister for Immigration and Border Protection (Cth), *Australian Citizenship (Permanent Resident Status) Determination (IMMI 17/108)* (F2017L01284, 1 October 2017) sch 1 item 1, citing *Social Security Act* (n 113) s 7. See especially *Social Security Act* (n 105) ss 7(2A)–(2D).

203 *VAD Act* (Vic) (n 1) s 49.

204 *YSB* (n 21) [29] (Quigley P).

are an Australian citizen or permanent resident, including a New Zealand citizen on a SCV who has settled in Australia.²⁰⁵

This solution has the advantage of being broad and inclusive, and consistent with the purposes of the legislation. It is effective to exclude residents of other countries travelling to an Australian state to access VAD, but unlike the legal definitions in the *Migration Act* and *Australian Citizenship Act 2007*, it does not exclude long-term residents (such as UQL) from accessing VAD on the basis of the legal technicality that they remain citizens of New Zealand or other Commonwealth countries.

Further, it has the advantage of being the most practically workable option, as it is easy for medical practitioners to verify. Whereas dying patients such as ‘Alice’ and ‘Janet’ may have disposed of paperwork such as a birth certificate or passport, they would almost certainly have retained their Medicare card. For these reasons, this is our preferred approach to reform.

B Introduce an Alternative Three-Year Residence Requirement

A second option is to expressly include a broader criterion of residency than ‘Australian citizen or permanent resident’. For example, VAD legislation in NSW, Queensland, and Tasmania provides that a person may be eligible to apply for VAD if they are either: an Australian citizen, a permanent resident, or have been ‘ordinarily resident’ in Australia for at least three years before making a request to access VAD.²⁰⁶

To be eligible for VAD, a person must be either:

- a) an Australian citizen;
- b) a permanent resident; or
- c) have been resident in Australia for at least three continuous years prior to the first request to access VAD.

This proposal is a practical solution, similar to that proposed by Stuart Grimley MP in a private member’s bill introduced into Victorian Parliament in May 2021.²⁰⁷ Our second proposal would remove the problems faced by people such as UQL who are settled residents of a state but have not been in Australia long enough to hold an APV. It would also make it easier for people such as ‘Janet’ and ‘Alice’, who were unable to provide documentary proof of citizenship or permanent

205 ‘Note AN.0.6’ (n 201).

206 *VAD Act* (Qld) (n 5) s 10(1)(e). See also *VAD Act* (NSW) (n 6) s 16(1)(b); *EOLC Act* (Tas) (n 3) s 11(1)(a).

207 Voluntary Assisted Dying Amendment (Telehealth and Other Matters) Bill 2021 (Vic) cl 8. See Stuart Grimley, ‘Grimley Introduces Voluntary Assisted Dying Bill to Address Issues on Telehealth and Permanent Residency Interpretation’ (Media Release, 4 May 2021) <<https://media.stuartgrimley.com/wp-content/uploads/2021/05/27150235/Media-Release-Grimley-Introduces-Voluntary-Assisted-Dying-Bill-1.pdf>>, archived at <<https://perma.cc/H9UY-UE8Y>>. The bill was not debated in the Victorian Parliament.

residence. The requirement that a person be 'resident in Australia for at least three years' could be satisfied by reference to three years of medical records, bank statements or other documentation.

Although this definition would still exclude people, including New Zealand citizens on SCVs, who have arrived in Australia within the last three years and subsequently been diagnosed as terminally ill, it is significantly more inclusive than either the *Migration Act* or *Australian Citizenship Act 2007* definitions and avoids the arbitrary exclusions which have occurred when applying those definitions.

C Allow Applications for Exemption from the Residence Requirement

A third possible solution is to include a provision which enables a person to apply for an exemption from the residence requirements in certain circumstances.²⁰⁸ Currently, only the *VAD Act* (Qld) allows a person to apply for exemption from the 'Australian citizen or permanent resident' requirement.²⁰⁹ The Ministerial Expert Panel in Western Australia recommended that a person could apply to the State Administrative Tribunal for an exemption,²¹⁰ although this was not ultimately incorporated into the *VAD Act* (WA).²¹¹

Under the *VAD Act* (Qld), the chief executive must grant the exemption if satisfied that 'the person has a substantial connection to Queensland' and there are 'compassionate grounds' for granting the exemption.²¹² Two examples are given: residents of border communities who work in Queensland and receive medical treatment in Queensland (and who would therefore have an ongoing therapeutic relationship with medical practitioners in that state); and returning residents of Queensland whose family resides in Queensland. If non-Queensland residents may be granted an exemption, there would be even stronger grounds for a long-term resident of Queensland who is not the holder of a 'permanent resident' visa: that is, a person such as Julian Bareuther or UQL.

In the absence of an ability to apply for tribunal review of a decision on the permanent resident criterion, an ability to grant an exemption from this requirement may be a useful legislative amendment. However, making provisions for granting exemptions as the primary means of addressing the possible inequity

208 This was suggested by Victorian Coroner Phillip Byrne in the *Bareuther Finding* (n 21) [11].

209 *VAD Act* (Qld) (n 5) s 12(1)(a). In NSW, a person can apply for an exemption from the requirement to be resident in the State for 12 months, but not from the 'Australian citizen or permanent resident' requirement: *VAD Act* (NSW) (n 6) s 17(1).

210 *WA Panel Report* (n 35) 20. The Panel was particularly concerned in that State with the position of fly-in fly-out workers and returning residents.

211 The government felt it was too liberal: Western Australia, *Parliamentary Debates*, Legislative Council, 26 November 2019, 9198 (Stephen Dawson).

212 *VAD Act* (Qld) (n 5) s 12(2). See also *VAD Act* (NSW) (n 6) s 17(2).

described above is not the optimal method of addressing the permanent residence issue. 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,²¹³ 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 either of the two reform options suggested above. The *VAD Act* (Qld) includes both the ability to apply for an exemption and the three-year residence criterion of eligibility, significantly improving the flexibility of the permanent residence criterion. However, it would also be possible to adopt our preferred approach — amending the *VAD Act* (Vic) to expressly adopt the plain English definition of ‘permanent resident’ — and also create a power to grant an exemption should it be appropriate to do so.

VI INTERIM POLICY SOLUTIONS

The preceding Part V has identified three possible ways in which (alone or in combination) state VAD laws can be amended to remove or ameliorate the problems faced by long-term residents of a state who are currently excluded from accessing VAD by the requirement to be an ‘Australian citizen or permanent resident’. The purpose of this final section is to suggest a number of policy changes that could be considered in Victoria, Western Australia, and South Australia in the interim, before legislative amendment is undertaken.

In the succeeding subparts, we identify three ways in which existing policy in Victoria (the *Victorian VAD Guidance*), South Australia (the *SA VAD Clinical Guideline*) and Western Australia (the *Western Australian Voluntary Assisted Dying Guidelines*) could be revised, to clarify the meaning of ‘permanent resident’ in the eligibility criteria. Firstly, we suggest policy could be revised to adopt the plain and ordinary meaning of the term ‘permanent resident’, rather than the narrow interpretation in the *Migration Act*. Secondly, we suggest policy include reference to two types of permanent visas (currently not mentioned) which would render a person eligible to access VAD: APVs and ex-citizen visas. Thirdly, we propose introducing a statutory declaration to provide greater flexibility in situations where documentary evidence is unavailable.

A Adopt the Plain English Definition of ‘Permanent Resident’

As discussed above, in our view the definition of ‘permanent resident’ adopted in the *Victorian VAD Guidance* is not the correct or preferable definition. The term ‘permanent resident’ is not defined in the legislation or its extrinsic material. In Part IV(D), we concluded that the ordinary and natural meaning of ‘permanent resident’ as a long-term settled resident of a place best accords with both the text, and the express and implied purposes of the VAD Acts. If the Victorian government

213 White et al, ‘Does the *Voluntary Assisted Dying Act 2017* (Vic) Reflect Its Stated Policy Goals?’ (n 14) 442.

were to adopt the ordinary and natural meaning of the term, this would mean that long-term residents of Victoria such as Julian Bareuther and UQL would not be excluded from accessing VAD, an exclusion which is arbitrary and contrary to the statutory purposes.

In Part V(A), we have recommended legislative reform to make this position clear. However, legislative reform is not required, because there is no definition of 'permanent resident' currently in the relevant state VAD Acts. This position, as the preferred interpretation of the existing law, could be adopted by the Department of Health now and we therefore recommend that the *Victorian VAD Guidance* be amended to reflect this approach. It may state, for example:

A person who is a long-term settled resident of Australia is a 'permanent resident'. Evidence of permanent residence may include:

- a permanent resident visa;
- having been issued a green Medicare card;
- medical records evidencing ongoing medical treatment over an extended period in Australia;
- owning and living in a residential property in Australia; or
- leasing and living in a residential property in Australia on an ongoing basis.

B Expressly Refer to All 'Permanent Resident' Visas

Even if the Department of Health does not wish to adopt our preferred policy position, some adjustment to existing policy is necessary. As outlined in Part II, the *Victorian VAD Guidance* appears to have adopted the narrowest of the five possible definitions of 'permanent resident' given in Table 5: the *Migration Act* definition. However, the *Victorian VAD Guidance* is incomplete as it does not refer to two classes of permanent visas — APVs and ex-citizen visas — which are granted under the *Migration Act* by operation of law (not by applying for a visa). APVs in particular are potentially significant for a class of long-term residents: those who have been resident in Australia since before 2 April 1984, who have not left Australia since then, and have become absorbed into the Australian community.

By referring only to visa documents which can be evidenced by applying for an electronic visa record or obtaining a visa printout from the VEVO system, the *Victorian VAD Guidance* could be interpreted by medical practitioners as meaning no other classes of person are eligible for permanent visas, thus wrongly denying these residents access to VAD. A medical practitioner cannot be expected to be aware of the existence of statutory permanent visas such as APVs and ex-citizen visas unless the relevant state policy guidance specifically refers to them. The person seeking access to VAD themselves is likely to be unaware they even have this status.

This omission assumes additional significance given that a decision about whether a person is a 'permanent resident' is not reviewable by VCAT. The only way a person aggrieved by such a decision could seek review is to bring an application

for judicial review in the Supreme Court of Victoria:²¹⁴ a costly and time-consuming process unlikely to be feasible for a terminally ill person at the end of life.

Given the conclusion above that Julian Bareuther was likely to be a permanent resident on this basis, and that there are likely other patients who may be wrongly determined as ineligible for VAD, revisions to the *Victorian VAD Guidance* and statements in the Western Australian and South Australian policy are needed to include these categories of permanent resident whose details may not be entered on VEVO. The *Victorian VAD Guidance* may state, for example:

- If a person arrived in Australia prior to 2 April 1984, and has not left Australia since, the person may hold a permanent visa known as an ‘absorbed person visa’. This visa is granted by operation of law and details of this visa may not be contained on the VEVO system.
- If a person was formerly an Australian citizen, but has taken out citizenship of another country which does not allow dual citizenship, or has renounced their Australian citizenship, they will hold a permanent ‘ex-citizen visa’ while they remain resident in Australia. Details of this visa may not be contained on the VEVO system.
- If either of these circumstances apply, a statutory declaration setting out the details of their circumstances is sufficient documentary evidence that a person is a permanent resident.

C Include a Statutory Declaration as Evidence of ‘Permanent Residence’

Finally, the inflexible application of the policy instructions contained in the *Victorian VAD Guidance* may lead to people who are eligible for VAD being determined to be ineligible if they are unable to locate the necessary documentation at the end of their life or are unable to verify their residency situation using the VEVO system.

One significant problem with the *Victorian VAD Guidance* is that it is difficult to prove that a person is a ‘permanent resident’ if the person arrived in Australia before 1990 and has not left Australia since. Such a person is ‘unlikely to have an electronic visa record’.²¹⁵ To create an electronic visa record on VEVO, a person usually needs a valid passport and other identity documents, including ‘evidence

214 The medical practitioner’s decision on eligibility is not directly reviewable, as a medical practitioner is not an administrative decision-maker. It could be argued that the Department’s decision to issue the *Victorian VAD Guidance* (n 17) is the reviewable decision. See generally *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 56; *Administrative Law Act 1978* (Vic).

215 ‘Request an Electronic Visa Record’, *Department of Home Affairs* (Web Page, 3 June 2022) <<https://immi.homeaffairs.gov.au/visas/permanent-resident/evidence-of-residency-status/request-an-electronic-visa-record>>.

of your first arrival in Australia'.²¹⁶ However, given that such residents have not left Australia since 1990, they may not have a valid passport from their country of origin, and may not have retained evidence of their arrival in Australia. The Department of Home Affairs does not clarify how a person can prove they hold a permanent resident visa in the absence of these documents.

The statement in the *Victorian VAD Guidance* that '[y]ou should always view the patient's original passport or identity document to ensure that it matches the details on the VEVO print out'²¹⁷ may lead medical practitioners to believe that if a patient does not have a passport or cannot obtain a VEVO printout of their permanent residence visa, they are ineligible to access VAD. This is not strictly correct. The *VAD Act* (Vic) requires a person to be a 'permanent resident'²¹⁸ but does not expressly require documentary proof. For the *Victorian VAD Guidance* to be interpreted as requiring documentary evidence where none is available may be regarded as an inflexible departure from the terms of the statute.²¹⁹

Dr Carr has suggested that '[t]here needs to be some capacity to recognise that very old and very sick people may not be good at paperwork and it's not at the forefront of their minds when they are dying'.²²⁰

He proposes a legally binding document — such as a statutory declaration, which is signed and witnessed — that could provide sufficient evidence that a terminally ill person is a 'permanent resident' when their identity documents are difficult to obtain.²²¹ We agree. We recommend that the Department of Health should consider amending the *Victorian VAD Guidance* to state:

If a person is an Australian citizen or permanent resident, but is unable to obtain relevant identity documents, they may provide a statutory declaration setting out the details of their circumstances as documentary evidence.

216 Ibid.

217 *Victorian VAD Guidance* (n 17) 73.

218 *VAD Act* (Vic) (n 1) s 9(1)(b)(i).

219 If the *Victorian VAD Guidance* (n 17) is applied inflexibly, without regard to the fact that some permanent visas are not discoverable through the VEVO system, the policy might be ultra vires and invalid: *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634, 640–1 (Brennan J). Administrative policy must not preclude decision-makers from being able to take into account the circumstances of the particular case: *Seiffert v Prisoners Review Board* [2011] WASCA 148, [124] (Martin CJ), quoted in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, 193 [52] (French CJ, Bell, Keane and Gordon JJ). See also *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87, 98 (Hill J); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 286–7 [17] (Gleeson CJ), quoting *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407, 496–7 (Lord Browne-Wilkinson).

220 Cunningham (n 23).

221 Ibid.

This simple suggestion would address the problems faced by ‘Janet’ and ‘Alice’, who were unable to locate the relevant paperwork to prove they were a permanent resident and Australian citizen respectively.

VII CONCLUSION

When state parliaments enacted their groundbreaking laws legalising VAD, they could not have expected that one of the main areas of controversy surrounding VAD in practice would be the residence requirements of eligibility. Along with age,²²² these seem like purely formal demographic characteristics. Elsewhere, we have considered in detail the operation of the substantive eligibility criteria: the terminal illness requirement, and the requirements of capacity and voluntariness.²²³ The difficulties of offering a reliable prognosis for the trajectory and life expectancy of a person’s illness, even in the terminal stages,²²⁴ and the challenges associated with the determination of decision-making capacity are well-known.²²⁵ Anticipating these challenges, state VAD laws contain provisions for a coordinating or consulting medical practitioner to seek a specialist opinion on diagnosis, prognosis, or decision-making capacity in case of uncertainty.²²⁶ The

222 *VAD Act* (Vic) (n 1) s 9(1)(a).

223 See Ben P White et al, ‘Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying under Five Legal Frameworks’ (2021) 44(4) *University of New South Wales Law Journal* 1663; Ben P White et al, ‘Who Is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks’ (2022) 45(1) *University of New South Wales Law Journal* 401.

224 See Joanne Lynn et al, ‘Defining the “Terminally Ill”: Insights from SUPPORT’ (1996) 35(1) *Duquesne Law Review* 311, 324; Eric Chevlen, ‘The Limits of Prognostication’ (1996) 35(1) *Duquesne Law Review* 337; James Downar et al, ‘The “Surprise Question” for Predicting Death in Seriously Ill Patients: A Systematic Review and Meta-Analysis’ (2017) 189(13) *Canadian Medical Association Journal* E484; Paul Glare et al, ‘Predicting Survival in Patients with Advanced Disease’ (2008) 44(8) *European Journal of Cancer* 1146, 1147.

225 See Laura L Sessums, Hanna Zembrzuska and Jeffrey L Jackson, ‘Does This Patient Have Medical Decision-Making Capacity?’ (2011) 306(4) *Journal of the American Medical Association* 420; James L Werth Jr, G Andrew H Benjamin and Tony Farrenkopf, ‘Requests for Physician-Assisted Death: Guidelines for Assessing Mental Capacity and Impaired Judgment’ (2000) 6(2) *Psychology, Public Policy, and Law* 348; Louis C Charland, Trudo Lemmens and Kyoko Wada, ‘Decision-Making Capacity to Consent to Medical Assistance in Dying for Persons with Mental Disorders’ (2016) 9 *Journal of Ethics in Mental Health* 1; Guy AM Widdershoven and Cecilia MT Gijsbers van Wijk, ‘Commentary on Charland et al., “Decision-Making Capacity to Consent to Medical Assistance in Dying for Persons with Mental Disorders”’ (2016) (Special Theme Issue II) *Journal of Ethics in Mental Health* 1; Alex Holmes et al, ‘Can Depressed Patients Make a Decision to Request Voluntary Assisted Dying?’ (2021) 51(10) *Internal Medicine Journal* 1713; Carmelle Peisah, Linda Sheahan and Ben P White, ‘Biggest Decision of Them All — Death and Assisted Dying: Capacity Assessments and Undue Influence Screening’ (2019) 49(6) *Internal Medicine Journal* 792.

226 *VAD Act* (SA) (n 4) ss 36(1)–(2), 45(1)–(2); *VAD Act* (Vic) (n 1) ss 18(1)–(2), 27(1)–(2); *VAD Act* (WA) (n 2) ss 26(1)–(2), 37(1)–(2). In Western Australia, a medical practitioner may also seek a second opinion on a patient’s voluntariness if the medical practitioner is unsure: *VAD Act* (WA) (n 2) ss 26(3), 37(3).

laws also provide for tribunal review on the question of capacity.²²⁷ By contrast, there is no provision for review of decisions concerning the citizenship or permanent residency criterion. This suggests the problems described in Part III concerning the interpretation of the residence requirements were not foreseen by the Parliament.

In Part IV, we have examined the meaning of 'permanent resident' in detail. We have concluded that nothing in the text, context, or purpose of the *VAD Act* (Vic) requires the Victorian government to adopt the narrow interpretation of 'permanent resident' that it has adopted or requires other state governments to adopt this definition of 'permanent resident'. Our preferred interpretation is the plain English meaning of the term 'permanent resident', rather than the technical legal meaning found in the *Migration Act* or the *Australian Citizenship Act 2007*. This approach best gives effect to the purposes of the state VAD laws. In Part V, we recommended amending state VAD laws to expressly define 'permanent resident' in accordance with its ordinary and natural meaning. In the alternative, we recommended introducing an additional alternative criterion of residence: that a person must be 'ordinarily resident in Australia for at least three years' prior to making a first request for VAD. In conjunction with these amendments, we also recommended introducing flexibility by permitting a person to apply for an exemption from these criteria in appropriate cases. Such reforms will significantly alleviate the problems described above for long-term residents. These proposed changes align with the purposes of the VAD legislation, while continuing to exclude VAD tourists and reserve taxpayer-funded services to long-standing members of the community.

In the absence of statutory amendment, we have also made a number of suggestions for policy clarification. At a minimum, we recommend that the *Victorian VAD Guidance* be amended as soon as possible to include reference to APVs and ex-citizen visas, and to make clear that not all permanent resident visas will be discoverable on the VEVO system. We also recommend that Victorian, South Australian, and Western Australian policy be amended to reflect the plain English definition of 'permanent resident', rather than focus exclusively on visa status, and permit a statutory declaration of permanent residence in lieu of documentary evidence where this is impractical to obtain in the circumstances.

Australian VAD laws are highly prescriptive legislative regimes, with multiple safeguards designed to protect vulnerable people and ensure access to VAD is truly voluntary.²²⁸ The eligibility criteria are arguably the most significant aspect of these laws, as they play a key role in controlling who will have access to VAD, and

227 *VAD Act* (SA) (n 4) ss 85(1)(a)(iii), (b)(iii), (c)–(d); *VAD Act* (Vic) (n 1) ss 68(1)(a)(iii), (b)(iii), (c)–(d); *VAD Act* (WA) (n 2) ss 84(1)(a)(ii), (b)(ii), (c)(i).

228 The *VAD Act* (Vic) (n 1) was lauded for incorporating 68 safeguards: Daniel Andrews, 'Voluntary Assisted Dying Model Established Ahead of Vote in Parliament' (Media Release, 25 July 2017). See also *Victorian Parliamentary Committee Report* (n 199) 221–8. The *VAD Act* (WA) (n 2) was then claimed to have 102 safeguards: Mark McGowan and Roger Cook, 'Landmark Voluntary Assisted Dying Legislation to Be Introduced' (Media Statement, 6 August 2019).

who should be excluded.²²⁹ As such, it is critical that these eligibility criteria are clear, fair, and consistent with the overall purposes of the legislation. The eligibility criterion of ‘Australian citizen or permanent resident’ is intended to prevent access to VAD by citizens of other countries. However, bizarrely and unfortunately, the effect of including this requirement has been to exclude access to VAD for some long-term residents of the state who are not vulnerable and have made a voluntary decision to access it. This unintended consequence is regrettable, even tragic, for those affected.

229 See generally White et al, ‘Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying under Five Legal Frameworks’ (n 223); White et al, ‘Who Is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks’ (n 223).