AUTISTIC ADULTS AND SUPPORTED DECISION-MAKING: RETHINKING AUSTRALIA'S GUARDIANSHIP FRAMEWORKS

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Australian guardianship law increasingly recognises that decision-making ability, often described in domestic law as capacity, is functional, contextual and decision-specific. For autistic adults, however, recognition of capacity does not necessarily secure the communicative, sensory, temporal and relational conditions through which legal agency can be exercised. This article argues that the central defect in Australian guardianship frameworks is not the absence of decision-specific capacity doctrine, but the absence of formal and autism-responsive support pathways that operate before substitute decision-making is considered. It distinguishes common law capacity doctrine, guardianship legislation and tribunal practice; examines art 12 of the Convention on the Rights of Persons with Disabilities; evaluates Australian statutory and tribunal developments; and draws design insights from selected Canadian regimes. It proposes a tribunal-adapted model of voluntary supporter authorisations, structured support orders and, only where domestic law retains them, tightly confined representative orders. The aim is to move from capacity recognition to capacity access, so that autistic adults are neither abandoned as too capable for formal support nor unnecessarily restrained because no less-restrictive, legally recognised support pathway exists.

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I INTRODUCTION

For autistic adults, decision-making support can be essential to autonomy, dignity, legal capacity and participation.[1] The need for support is not captured by asking, in the abstract, whether a person is "capable" or "incapable". An autistic adult may understand a financial, health, housing or service decision, know the outcome they prefer and still be unable to demonstrate that decision in the conditions ordinarily created by law, administration or institutional practice.[2] Information may be delivered orally, quickly or under pressure. Meetings may take place in noisy, brightly lit, unfamiliar or adversarial settings. Documents may be complex, fragmented or poorly sequenced. The adult may need written information in advance, time to process options, augmentative or alternative communication, a low-sensory setting, assistance organising material or a trusted person to help compare options and communicate a decision.[3]

The need for support does not mean that an autistic adult lacks capacity. In many cases, support is the means by which capacity is exercised, communicated and

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[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 3(a), 3(c), 12(2)–(3) ('*CRPD*'); Committee on the Rights of Persons with Disabilities, *General Comment No 1*: *Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) 3 [13], 4–5 [16]–[17] ('*General Comment No 1*'); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 67–8 [3.18]–[3.24], 11–12 rec 3–2 ('ALRC Report 124').

[2] See generally *General Comment No 1* (n 1) 3–4 [13]–[15]; ALRC Report 124 (n 1) 12 rec 3–2(2), 71–4 [3.36]–[3.47]; Rachael Stacey and Eilidh Cage, '"Simultaneously Vague and Oddly Specific": Understanding Autistic People's Experiences of Decision Making and Research Questionnaires' (2023) 5(3) *Autism in Adulthood* 263, 263–4; Lydia Vella et al, 'Understanding Self-Reported Difficulties in Decision-Making by People with Autism Spectrum Disorders' (2018) 22(5) *Autism* 549.

[3] National Institute for Health and Care Excellence, *Autism Spectrum Disorder in Adults: Diagnosis and Management* (Clinical Guideline No CG142, 27 June 2012, updated 14 June 2021) 13 rec 1.1.8, 16 rec 1.2.1, 23–4 recs 1.3.1–1.3.3, 31 rec 1.6.3, 34 rec 1.8.9 <www.ncbi.nlm.nih.gov> ('*Autism Spectrum Disorder in Adults*'); Stacey and Cage (n 2) 263–4; David Trembath et al, 'Augmentative and Alternative Communication Supports for Adults with Autism Spectrum Disorders' (2014) 18(8) *Autism* 891; ALRC Report 124 (n 1) 11 rec 3–2(1)(c), 68 [3.24], 71 [3.33]–[3.35].

recognised.[4] Nor does autism imply a need for formal support in every case; many autistic adults will require little or none.[5] The legal difficulty arises when legal and administrative systems treat communication difference, anxiety, sensory distress, executive-function demands, delayed processing or reliance on support as evidence of impaired decision-making ability. In those circumstances, support may be withheld because the person is assumed to be capable without it, or capacity may be denied because the environment in which the decision is assessed has made that capacity difficult to demonstrate.[6]

This article uses the terminology of capacity carefully. Legal capacity encompasses legal standing as a holder of rights and duties and legal agency: the authority to act on those rights and have decisions recognised as legally effective.[7] Mental capacity, by contrast, refers to a person's functional decision-making abilities. Domestic capacity tests may ask whether a person can understand, retain, use or weigh relevant information and communicate a decision, assessed by reference to the particular decision and circumstances.[8] Article 12 of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*') protects equal legal capacity and requires access to support in its exercise. Australian common law and guardianship statutes often use mental or functional capacity inquiries, or decision-making ability tests, to determine validity, statutory intervention or need for an order. The article's argument is not that autistic adults lack mental capacity. It is that legal capacity may remain practically inaccessible where those inquiries are conducted without

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[4] *CRPD* (n 1) art 12(3); *General Comment No 1* (n 1) 3 [13], 4–5 [16]–[17]; ALRC Report 124 (n 1) 12 rec 3–2(2)(b)–(c), 68 [3.22]–[3.24], 72–3 [3.37]–[3.40]; Vella et al (n 2) 557.

[5] ALRC Report 124 (n 1) 12 rec 3–2(1)(d), 12 rec 3–2(2)(b), 71 [3.31], [3.33]; World Health Organisation, 'Autism' (Fact Sheet, 17 September 2025) <www.who.int>.

[6] Lydia Luke et al, 'Decision-Making Difficulties Experienced by Adults with Autism Spectrum Conditions' (2012) 16(6) *Autism* 612; Vella et al (n 2); Dawn Adams and Stephanie Malone, 'The Impact of Anxiety on Decision Making in Individuals with Intellectual and Developmental Disabilities or a Diagnosis on the Autism Spectrum' in Ishita Khemka and Linda Hickson (eds), *Decision Making by Individuals with Intellectual and Developmental Disabilities* (Springer, 2021) 173; Tanya St John et al, 'A Review of Executive Functioning Challenges and Strengths in Autistic Adults' (2022) 36(5) *The Clinical Neuropsychologist* 1116; Maria Strömberg et al, 'Experiences of Sensory Overload and Communication Barriers by Autistic Adults in Health Care Settings' (2022) 4(1) *Autism in Adulthood* 66; Amy L Donaldson, endever* corbin and Jamie McCoy, '"Everyone Deserves AAC": Preliminary Study of the Experiences of Speaking Autistic Adults who Use Augmentative and Alternative Communication' (2021) 6(2) *Perspectives of the ASHA Special Interest Groups* 315; Ashley de Marchena et al, 'Communication in Autistic Adults: An Action-Focused Review' (2025) 27(8) *Current Psychiatry Reports* 471.

[7] *General Comment No 1* (n 1) 3–4 [12]–[14].

[8] Ibid 3–4 [13]–[15] (distinguishing mental and legal capacity and criticising the use of mental-capacity assessments to deny legal capacity); *Guardianship and Administration Act 2019* (Vic) s 5(1) ('*GAA* Vic') (a domestic decision-making capacity test).

autism-responsive support, and where no formal support pathway exists short of substitute decision-making.

That distinction matters because Australian law does not, as a whole, lack decision-specific capacity doctrine. At common law, the relevant capacity inquiry is functional, contextual and transaction-specific. The inquiry is not whether a person is capable in the abstract, but whether they have the understanding required for the particular legal act, at the particular time and in the circumstances in which the decision is made.[9] That principle is important for autistic adults because it directs attention away from diagnosis or presentation and towards the actual decision, the person's understanding and the conditions in which that understanding is assessed.

Although the common law recognises that capacity varies by decision, its role is limited. It generally operates retrospectively, asking whether a legal act was valid once it has been performed or challenged.[10] It does not itself build the conditions necessary for capacity to be exercised in real time. It does not require institutions to provide accessible communication, additional processing time, sensory adjustments, assistance to organise information or recognition of a chosen supporter whom a bank, hospital, landlord, university, employer, government agency or tribunal must engage with.[11]

That common law position must be distinguished from guardianship legislation. Guardianship and administration statutes do more than assess whether a particular legal act is valid. They create statutory mechanisms through which tribunals may appoint a guardian, administrator or financial manager, and thereby transfer decision-making authority from the adult to another person, where the relevant statutory criteria are satisfied.[12] Several Australian statutes incorporate elements of a support-sensitive approach. They may presume capacity, focus on capacity for a particular matter, require consideration of available supports and less-restrictive

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[9] *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ) ('*Gibbons*'); *Hanna v Raoul* [2018] NSWCA 201, [47]–[52] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]), [161] (Macfarlan JA) ('*Hanna*'); *PBU & NJE v Mental Health Tribunal* (2018) 56 VR 141, 186–7 [148]–[151] (Bell J) ('*PBU & NJE*').

[10] See, eg, *Gibbons* (n 9) 437–8, 441 (Dixon CJ, Kitto and Taylor JJ); *Hanna v Raoul* (n 9) [52]–[58] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]); Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (AustLII Communities, 2021 ed, 14 December 2021) ch 3 [3.3]–[3.3.1] <https://austlii.community/>.

[11] Cf ALRC Report 124 (n 1) 96–7 [4.29]–[4.32], 187–9 [6.150]–[6.159]; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 179–81, rec 6.8 ('*Disability Royal Commission*'). These sources address formal support mechanisms, rather than the validity of a completed legal act. See also *CRPD* (n 1) arts 12(3), 21.

[12] See, eg, *Guardianship Act 1987* (NSW) ('*GA* NSW'); *Guardianship and Administration Act 1993* (SA) ('*GAA* SA'); *Guardianship and Administration Act 1990* (WA) ('*GAA* WA'); *GAA* Vic (n 8).

alternatives or direct decision-makers to give weight to the adult's will, preferences and rights.[13] Victoria has gone further by creating supportive guardianship and supportive administration.[14] The statutory landscape, however, remains fragmented. Across jurisdictions, formal mechanisms short of substitute decision-making are unevenly developed, leaving a gap between legislative commitments to capacity, support and least restriction and the practical pathways available to give those commitments effect.[15]

Tribunal practice must also be distinguished from statutory design. Published decisions of the New South Wales ('NSW') Civil and Administrative Tribunal ('NCAT'), while necessarily only a partial record of day-to-day practice, show that the Tribunal may reason functionally and with close attention to current evidence. It may ask whether an order is necessary at all, and may refuse, limit, revoke or allow to lapse orders where informal supports, enduring appointments or other existing arrangements are sufficient, or where current evidence shows that the person can make relevant decisions with appropriate support.[16] Tribunal discretion can protect against overreach in particular cases, but it cannot perform the work of a formal support pathway. It may prevent an unnecessary guardianship or administration order, yet still leave an autistic adult without a clear and enforceable means of obtaining the adjustments or decision-making assistance needed to exercise capacity in practice.

The argument advanced in this article is an access-to-capacity argument. Autistic adults may fall between legal categories: regarded as too capable to justify guardianship, yet insufficiently supported by informal arrangements; or treated as incapable because the conditions in which decisions are required prevent their abilities from being recognised. Informal support is often essential, but legally fragile. It may depend on family availability, service relationships, social networks and the willingness of banks, hospitals, landlords, service providers or public

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[13] *Guardianship and Administration Act 2000* (Qld) ss 11, 11B, 12 ('*GAA* Qld'); *Guardianship and Administration Act 1995* (Tas) ss 8–12 ('*GAA* Tas'); *Guardianship of Adults Act 2016* (NT) ss 4, 5, 5A ('*GAA* NT'); *Guardianship and Management of Property Act 1991* (ACT) ss 4, 6A, 7 ('*GMPA* ACT'); *GAA* Vic (n 8) pt 4.

[14] *GAA* Vic (n 8) pt 4, especially ss 87, 90–4; *Disability Royal Commission* (n 11) vol 6, 179–80.

[15] See *Disability Royal Commission* (n 11) vol 6, 159, 179–81, 190; ALRC Report 124 (n 1) 96–7 [4.29]–[4.32]; Christine Bigby et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-Making* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, January 2023) 1–2 ('*Diversity, Dignity, Equity and Best Practice*').

[16] 'Published Decisions', *NSW Civil and Administrative Tribunal* (Web Page) <https://ncat.nsw.gov.au/>; NSW Civil and Administrative Tribunal, 'NCAT Policy 2: Publishing Reasons for Decisions' (Policy, October 2019). For illustrations of published practice, see, listed chronologically: *QHN* [2019] NSWCATGD 34; *JHN* [2020] NSWCATGD 92; *CKJ* [2022] NSWCATGD 16; *GKC [No 2]* [2024] NSWCATGD 7.

agencies to recognise the supporter's role.[17] Where those conditions fail, the law risks both under-support and over-protection: leaving adults without the support needed to exercise legal agency, or moving too readily towards substituted decision-making.

This article develops that argument in six substantive parts. Part II explains why autistic decision-making support needs are best understood as matters of communication, sensory access, processing time, executive functioning and relational support, rather than as evidence of incapacity. Part III distinguishes art 12, *General Comment No 1*[18] and Australian common law capacity doctrine and shows why a validity doctrine cannot itself operate as a support architecture. Part IV maps state and territory legislation and published tribunal decisions, with particular attention to the gap between support-sensitive reasoning and formal support pathways. Part V provides for an implementation requirement: decision-specific capacity must be matched by decision-specific support. Part VI draws design insights from selected Canadian regimes. Part VII then proposes a tribunal-adapted Australian framework comprising voluntary supporter authorisations, structured support orders and, only where domestic law retains them, tightly confined representative orders. The aim is to move Australian guardianship law from recognising capacity in theory to enabling autistic adults to access and exercise legal capacity in practice.

II Autistic Adults and the Conditions for Exercising Legal Capacity

Autism-specific analysis of decision-making support is necessary, and it must be framed with care. Autistic adults' support needs warrant focused analysis because legal capacity is exercised through particular communicative, sensory, cognitive and relational conditions.[19] Legal, medical, financial and service systems often assume rapid spoken communication, tolerance of stressful environments, linear processing, conventional social presentation and immediate verbal expression of

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[17] For the practical importance of relationships and support networks, see Bigby et al, *Diversity, Dignity, Equity and Best Practice* (n 15) 84–6; Office of the Public Advocate (SA), *Developing a Model of Practice for Supported Decision Making* (Practice Manual, June 2011) 11–12. On the case for legal recognition of supporters, see ALRC Report 124 (n 1) 93 [4.12]–[4.13], 96–7 [4.29]–[4.32]. These materials explain the support and recognition problem; they do not establish that every institution refuses informal support.

[18] *General Comment No 1* (n 1).

[19] Valerie Satkoske, Joann M Migyanka and David Kappel, 'Autism and Advance Directives: Determining Capability and the Use of Health-Care Tools to Aid in Effective Communication and Decision-Making' (2020) 37(5) *American Journal of Hospice and Palliative Medicine* 354, 354–5; Kate Silver and Sarah Parsons, 'Perspectives of Autistic Adults on the Strategies that Help or Hinder Successful Conversations' (2022) 7 *Autism & Developmental Language Impairments* 1, 1–3, 6–9; Bigby et al, *Diversity, Dignity, Equity and Best Practice* (n 15) 2, 83–6; *CRPD* (n 1) art 12(2)–(3).

preference. Those assumptions may obscure an autistic adult's understanding, preference or will. They may also lead decision-makers to treat the need for accommodation as evidence that the person lacks capacity, rather than as evidence that the decision-making process itself has not been made accessible.[20]

Three distinctions are important at the outset. At common law, capacity is a functional inquiry directed to the particular act, transaction or decision.[21] In guardianship legislation, the inquiry is statutory: whether the criteria for appointment, functions and limitations are satisfied.[22] In tribunal practice, the inquiry is also evidentiary and procedural: how decision-makers assess the person's actual functioning, available supports, risks and less-restrictive alternatives in the circumstances of the matter.[23] This Part is concerned with an earlier question: what communicative, sensory, cognitive and relational conditions must be in place for autistic adults to exercise, communicate and have their legal capacity recognised?

Australian population data confirms that support needs are significant, while also requiring careful interpretation. In 2022, the Australian Bureau of Statistics reported that 59.2% of autistic people needed assistance with at least one activity on a daily basis and that 39.4% needed daily assistance with cognitive or emotional tasks.[24] These figures are relevant because cognitive and emotional support may shape how a person accesses information, manages stress, sequences tasks, compares options or communicates a decision. However, they do not measure legal incapacity, the need for guardianship or inability to make any particular decision.

Adult autism literature supports this distinction. It does not support treating autism as evidence of reduced decision-making capacity. Rather, it shows that decision-making can depend heavily on the conditions in which a decision is made.[25]

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[20] Luke et al (n 6) 618–19; Vella et al (n 2) 557–8.

[21] *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *CJ v AKJ* (2015) 16 ASTLR 24, 30–1 [32]–[33] (Lindsay J) ('*CJ*'); *Scott v Scott* (2012) 7 ASTLR 299, 326 [199], 326–7 [205] (Lindsay J) ('*Scott*'). See also *Ghosn v Principle Focus Pty Ltd [No 2]* [2008] VSC 574, [69]–[70], [77]–[78] (Forrest J) ('*Ghosn*'), explaining the contextual understanding required for a power of attorney and its consistency with *Gibbons*.

[22] See, eg, *GA* NSW (n 12) ss 3(1) (definition of 'person in need of a guardian'), 4, 14–16, 21; *GAA* Vic (n 8) ss 5, 8, 30–4, 38–9; *GAA* Qld (n 13) ss 5, 12, 33–6.

[23] See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) ss 36, 38(2), (4), (6), sch 6 cls 4–7, 11; *GA* NSW (n 12) ss 4, 14(2), 15(4); *LGT* [2019] NSWCATGD 9, [9]–[11], [17]–[31] ('*LGT*'); *HZC* [2019] NSWCATGD 8, [29]–[34], [99]–[102].

[24] 'Autism in Australia, 2022', *Australian Bureau of Statistics* (Web Page, 11 October 2024) <www.abs.gov.au/>. The ABS category is broader than legal decision-making and should not be treated as a proxy for guardianship need.

[25] See, eg, Vella et al (n 2) 549–50, 557–8; George D Farmer, Simon Baron-Cohen and William J Skylark, 'People with Autism Spectrum Conditions Make More Consistent Decisions' (2017) 28(8) *Psychological Science* 1067, 1067–8, 1073–5; Benedetto De Martino et al, 'Explaining Enhanced

Some autistic adults may find decisions more difficult when information is vague, unpredictable, socially coded, time-pressured or loaded with unstated expectations.[26] Others may bring particular strengths to decision-making, including careful information-gathering, consistency, attention to detail and deliberative reasoning.[27] The legal significance is clear. Autistic adults may be better able to demonstrate and exercise capacity when the decision-making process is made accessible. That may require structured information, concrete options, adequate processing time, a low-pressure environment and the ability to use trusted support without transferring decision-making authority to another person.[28]

Communication is central. Some autistic adults communicate primarily through speech. Others are non-speaking or minimally speaking. Others speak in some contexts but rely on typing, augmentative and alternative communication, gestures, scripting, objects, routines, behaviour or trusted interpreters in others.[29] A speech-centric assessment risks mistaking delayed response, silence, atypical prosody, reduced eye contact, shutdown, echolalia, scripting or reliance on text for lack of understanding.[30] The correct legal question is not whether the person communicates in a neurotypical manner, but whether their will, preferences, understanding and decision can be elicited through the communication method most reliable for them.[31]

This has particular significance for non-speaking and minimally speaking autistic adults. The evidence base remains comparatively underdeveloped and, in some

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Logical Consistency during Decision Making in Autism' (2008) 28(42) *Journal of Neuroscience* 10746, 10749–50; Ana Macchia et al, 'Autistic Adults Avoid Unpredictability in Decision-Making' (2025) 55 *Journal of Autism and Developmental Disorders* 4234, 4234–5, 4242–4.

[26] See Luke et al (n 6) 612–13, 617–20; Stacey and Cage (n 2) 263–4, 267–71; Macchia et al (n 25) 4234–5, 4242–4; Philippa L Howard and Felicity Sedgewick, '"Anything but the Phone!": Communication Mode Preferences in the Autism Community' (2021) 25(8) *Autism* 2265, 2266–7, 2273–6.

[27] Farmer, Baron-Cohen and Skylark (n 25) 1073–5; De Martino et al (n 25) 10749–50; Luke et al (n 6) 618–19.

[28] See, eg, Vella et al (n 2); Michelle Browning, Christine Bigby and Jacinta Douglas, 'A Process of Decision-Making Support: Exploring Supported Decision-Making Practice in Canada' (2021) 46(2) *Journal of Intellectual and Developmental Disability* 138.

[29] Donaldson, corbin and McCoy (n 6).

[30] See Clare Cummins, Elizabeth Pellicano and Laura Crane, 'Autistic Adults' Views of their Communication Skills and Needs' (2020) 55(5) *International Journal of Language & Communication Disorders* 678, 678–9, 683–7; Howard and Sedgewick (n 26) 2266–7, 2273–6; de Marchena et al (n 6) 471–4, 476–9; Katie Logos et al, 'The Behavioral Presentation of Autistic Adults in a Forensic Interview' (2026) 56(9) *Journal of Autism and Developmental Disorders* 3503; Damian E M Milton, 'On the Ontological Status of Autism: The "Double Empathy Problem"' (2012) 27(6) *Disability & Society* 883, 884–6.

[31] *CRPD* (n 1) arts 12(3), 21(b); *General Comment No 1* (n 1) 4–5 [17].

areas, contested; some of the literature concerns children rather than adults.[32] Those limitations do not establish an absence of preference, language or decisional ability. They therefore support a cautious procedural approach: decision-makers should avoid inferring incapacity from lack of conventional speech; identify the adult's established communication methods; permit augmentative and alternative communication where used; and obtain skilled communication evidence where necessary.[33] A person's mode of communication is therefore not a preliminary hurdle to legal capacity. It is one of the conditions through which capacity may be exercised.

Executive functioning, anxiety and sensory load are also central to the conditions in which autistic adults exercise capacity.[34] Many legal, health, financial, housing and service decisions require more than understanding the final choice. They require planning, prioritising, comparing options, holding information in working memory, managing documents, meeting deadlines and implementing the decision after it has been made.[35] Executive-function differences may affect how a person organises information, sequences tasks or communicates a decision, without determining their values, preferences or right to decide.

Anxiety may make decision-making more difficult where processes are uncertain, rushed, socially demanding or high-stakes.[36] Sensory environments may further affect participation. Noise, bright lighting, crowded rooms, waiting areas, unpredictable questioning and adversarial procedures can all affect how easily an

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[32] For an adult-focused review, see de Marchena et al (n 6) 478–9. On the limitations and differing definitions in the broader evidence base, see Lynn Kern Koegel et al, 'Definitions of Nonverbal and Minimally Verbal in Research for Autism: A Systematic Review of the Literature' (2020) 50(8) *Journal of Autism and Developmental Disorders* 2957, 2957–60, 2967–70. The frequently cited account by Helen Tager-Flusberg and Connie Kasari, 'Minimally Verbal School-Aged Children with Autism Spectrum Disorder: The Neglected End of the Spectrum' (2013) 6(6) *Autism Research* 468, 468–70, concerns children and is not direct evidence of adult legal decision-making ability.

[33] Vikram K Jaswal, Andrew J Lampi and Kayden M Stockwell, 'Literacy in Nonspeaking Autistic People' (2024) 28(10) *Autism* 2503, 2503–4, 2511–12; Steven K Kapp, 'Profound Concerns about "Profound Autism": Dangers of Severity Scales and Functioning Labels for Support Needs' (2023) 13(2) *Education Sciences* 106:1, 6–9.

[34] E A Demetriou et al, 'Autism Spectrum Disorders: A Meta-Analysis of Executive Function' (2018) 23(5) *Molecular Psychiatry* 1198, 1198–9, 1203; Luke et al (n 6) 614–15, 618–19; Ye In (Jane) Hwang et al, 'Understanding Anxiety in Adults on the Autism Spectrum: An Investigation of its Relationship with Intolerance of Uncertainty, Sensory Sensitivities and Repetitive Behaviours' (2020) 24(2) *Autism* 411, 411–12, 417–19; Keren MacLennan, Sarah O'Brien and Teresa Tavassoli, 'In Our Own Words: The Complex Sensory Experiences of Autistic Adults' (2022) 52 *Journal of Autism and Developmental Disorders* 3061, 3069–73. For clinical adjustments, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 23 rec 1.3.2.

[35] St John et al (n 6).

[36] Luke et al (n 6) 614–15, 618–19; Hwang et al (n 34) 411–12, 417–19; *Autism Spectrum Disorder in Adults* (n 3) 23 rec 1.3.2.

autistic adult processes information, responds to questions or expresses a preference.[37] These features do not determine capacity, but they may determine whether capacity can be demonstrated.

For legal purposes, those barriers should not be treated as automatic evidence of incapacity. They may indicate the need for support. Relevant supports may include written information in advance, plain-language and visual explanations, reduced sensory load, breaks, asynchronous communication, extra time, predictable meeting structures, assistance to organise documents and the presence of a trusted supporter.[38] An autistic adult may be able to decide in a quiet room with written options, visual prompts and time to process, while appearing unable to decide in a noisy tribunal room, a rushed medical consultation or a high-pressure financial meeting. The difference is not necessarily capacity. It may be access.

The practical domains in which these issues arise are precisely those engaged by guardianship and administration regimes. Health-care studies show that autistic adults experience barriers including communication mismatch, inaccessible appointment systems, sensory environments and clinicians' limited autism knowledge.[39] Australian research on financial wellbeing indicates that autistic adults' financial circumstances are shaped by income, depression, financial behaviour, executive demands and the availability of practical support.[40] Housing research likewise suggests that independent living is often valued because it provides autonomy, control and personal space, while transitions into or between living arrangements may be constrained by environmental, financial and service

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[37] MacLennan, O'Brien and Tavassoli (n 34) 3061–2, 3069–73; Keren MacLennan et al, '"It Is a Big Spider Web of Things": Sensory Experiences of Autistic Adults in Public Spaces' (2023) 5(4) *Autism in Adulthood* 411, 411–12, 416–20. For clinical and procedural guidance, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2; Judicial Commission of New South Wales, 'Section 5 — People with Disabilities', *Equality before the Law Bench Book* (Online Bench Book, updated April 2025) [5.3.10], [5.6.3], [5.6.6.1], [5.6.7] <www.judcom.nsw.gov.au/>; The Advocate's Gateway, *Toolkit 3: Planning to Question People with Autism* (Toolkit, February 2026) 2 [8], 4–5 [27]–[36], 8–10 [59]–[71] <www.theadvocatesgateway.org/>.

[38] Luke et al (n 6) 618–19; *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2. For application in legal proceedings, see Judicial Commission of New South Wales (n 37) [5.6.3], [5.6.6.1], [5.6.7]; The Advocate's Gateway (n 37) 7–10 [49]–[71], 11 [81]–[86].

[39] Christina Nicolaidis et al, 'Comparison of Healthcare Experiences in Autistic and Non-Autistic Adults: A Cross-Sectional Online Survey Facilitated by an Academic-Community Partnership' (2013) 28(6) *Journal of General Internal Medicine* 761; Mary Doherty et al, 'Barriers to Healthcare and Self-Reported Adverse Outcomes for Autistic Adults' (2022) 12 *BMJ Open* e056904:1; Sarah RC Arnold et al, 'Barriers to Healthcare for Australian Autistic Adults' (2024) 28(2) *Autism* 301.

[40] Ru Ying Cai, Gabrielle Hall and Elizabeth Pellicano, 'Predicting the Financial Wellbeing of Autistic Adults: Part I' (2024) 28(5) *Autism* 1203; Elizabeth Pellicano, Gabrielle Hall and Ru Ying Cai, 'Autistic Adults' Experiences of Financial Wellbeing: Part II' (2024) 28(5) *Autism* 1090.

barriers.[41] These findings support targeted decision-making support, including clearer information, step-by-step options, sensory adjustments, communication access and trusted supporters, rather than a default move to substitute decision-making.

Stereotype is itself a legal risk. Autistic presentation may be misread by third parties as deceptive, suspicious, non-credible or otherwise inconsistent with expected forms of truthful behaviour. Empirical work suggests that autistic adults may be wrongly perceived as more deceptive and less credible than neurotypical adults, even when telling the truth, and that this may reflect their overall presentation rather than any reliable indicator of deception.[42] That risk is acute in capacity assessments, guardianship applications and tribunal hearings, where decision-makers often rely on presentation, responsiveness and perceived insight. Conversely, verbal fluency may mask significant support needs in executive functioning, anxiety management or decision implementation.[43] The law should therefore avoid both underestimation and overestimation. It should not assume incapacity from atypical presentation; nor should it assume that articulate adults need no support.

Autism spectrum disorder support levels in the *Diagnostic and Statistical Manual of Mental Disorders* and functioning labels should be treated with the same caution.[44] Clinical descriptors may be relevant background information, but they do not

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[41] Mustafa Al Ansari, Chris Edwards and Vicki Gibbs, '"Living Independently Means Everything to Me": The Voice of Australian Autistic Adults' (2024) 6(3) *Autism in Adulthood* 312; Debbie Mason et al, 'Autistic People and Moving Home: A Systematic Review' (2023) 5(3) *Autism in Adulthood* 236.

[42] Alliyza Lim, Robyn L Young and Neil Brewer, 'Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility' (2022) 52 *Journal of Autism and Developmental Disorders* 490.

[43] Luke et al (n 6) 618–19; Kate Johnston et al, 'Executive Function: Cognition and Behaviour in Adults with Autism Spectrum Disorders (ASD)' (2019) 49(10) *Journal of Autism and Developmental Disorders* 4181; Matthew J Hollocks et al, 'Anxiety and Depression in Adults with Autism Spectrum Disorder: A Systematic Review and Meta-Analysis' (2019) 49(4) *Psychological Medicine* 559; Gail A Alvares et al, 'The Misnomer of "High Functioning Autism": Intelligence Is an Imprecise Predictor of Functional Abilities at Diagnosis' (2020) 24(1) *Autism* 221. For practical assessment guidance, see New South Wales Department of Communities and Justice, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (Toolkit, reprint, April 2020) 30, 32–6; Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt: A Practical Guide for Solicitors* (Guidelines, 2016) 6–8. See also Katherine Martin, 'Using Capacity Assessments to Maximise Individuals' Autonomy: What Information Might Assist a Tribunal?' (2015) 37(4) *InPsych* <https://psychology.org.au/>.

[44] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, 2013) 52–3 ('DSM-5'); see also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, rev ed, 2022) 58 ('DSM-5-TR'); Amy S Weitlauf et al, 'Brief Report: DSM-5 "Levels of Support": A Comment on Discrepant Conceptualizations of Severity in ASD' (2014) 44(2) *Journal of Autism and Developmental Disorders* 471.

answer whether a person can understand, use, weigh or communicate information for a particular legal, health, financial, housing or service decision. Labels such as 'high-functioning', 'low-functioning' or 'profound autism' can obscure support needs, invite assumptions of incapacity and conflate communication, adaptive functioning, intelligence and legal agency.[45] The safer legal formulation is to identify the particular support needed for the particular decision: for example, assistance to compare options, tolerate the meeting environment, communicate with a service provider, organise records, manage deadlines or implement the decision once made.

This analysis identifies autism-specific support needs within a broader anti-stereotyping approach to disability and legal capacity. The same principle applies across disability contexts: legal capacity belongs equally to all adults, while the conditions needed to exercise and communicate that capacity may differ.[46] Dementia may make timing, fluctuation, review and advance planning especially salient.[47] Intellectual disability may make relational support, communication over time and supporter attitudes especially visible.[48] Autism may make sensory environment, processing time, anxiety, executive functioning and atypical communication especially important.[49] These are differences in support profile, rather than differences in legal personhood.

Accordingly, the reform question is not whether autistic adults occupy a special category outside ordinary capacity law. It is whether Australian guardianship and supported decision-making frameworks provide sufficiently flexible supports before, during and after a decision so that autistic adults can exercise legal capacity

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[45] Kapp (n 33) 4–5 (within-person variability and the limitations of severity levels); DSM-5-TR (n 44) 58 (clinical support-level descriptors). On the implications of terminology, rather than the contents of the DSM, see Kristen Bottema-Beutel et al, 'Avoiding Ableist Language: Suggestions for Autism Researchers' (2021) 3(1) *Autism in Adulthood* 18, 20–2.

[46] *CRPD* (n 1) arts 5, 8(1)(b), 12(2)–(3); *General Comment No 1* (n 1) 3 [13]. On non-stigmatising terminology, see Bottema-Beutel et al (n 45) 20–2.

[47] See Advance Care Planning Australia and Dementia Australia, *Advance Care Planning and Dementia: Joint Position Statement* (Position Statement, May 2026) 2–4.

[48] See Christine Bigby, Mary Whiteside and Jacinta Douglas, 'Providing Support for Decision Making to Adults with Intellectual Disability: Perspectives of Family Members and Workers in Disability Support Services' (2019) 44(4) *Journal of Intellectual & Developmental Disability* 396, 397–9; Jacinta Douglas and Christine Bigby, 'Development of an Evidence-Based Practice Framework to Guide Decision Making Support for People with Cognitive Impairment due to Acquired Brain Injury or Intellectual Disability' (2020) 42(3) *Disability and Rehabilitation* 434, 436–8; Joanne Watson, 'Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realisation of Article 12 for People with Severe or Profound Intellectual Disability' (2016) 5(1) *Laws* 6:1.

[49] Luke et al (n 6) 618–19; Johnston et al (n 43); Hollocks et al (n 43). For corresponding clinical adjustments, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2.

on an equal basis with others.[50] A person may retain legal capacity and still require support to exercise it effectively.[51] That support may include help to gather information, structure choices, understand consequences, regulate the decision-making environment, communicate will and preferences or implement the decision. Properly framed, such support does not undermine autonomy. It makes autonomy practically available.

This Part therefore supports the article's central thesis. The capacity of autistic adults is shaped not only by individual understanding, but by the conditions in which decisions are presented, processed, communicated and recognised. Where communication, sensory, processing or executive-functioning needs are not accommodated, an autistic adult may be wrongly treated as unable to decide. Where informal support is available but lacks recognition, the adult may still be left without practical assistance that third parties will accept. The task for reform is to move from capacity recognition to capacity access: to ensure that legal capacity can be exercised through the communicative, temporal, sensory, relational and practical conditions that make decision-making real.

Against that background, the next Part sets out the international and domestic legal baseline for that shift, showing how equal legal capacity and decision-specific capacity provide the foundation, but not yet the architecture, for supported decision-making.

III The Legal Baseline: Article 12 and Decision-Specific Capacity in Australian Law

Legal capacity must be understood through both international and domestic law. This Part begins with art 12 of the *CRPD* and *General Comment No 1*, which frame legal capacity as an equal right and require access to support in its exercise. It then turns to Australian common law capacity doctrine, which has long assessed mental or functional capacity by reference to the particular legal act, context and circumstances. It then brings those strands together by explaining why recognition of equal legal capacity, and a doctrine of decision-specific capacity, do not themselves create a support architecture. The question is how those principles can be translated into practical, legally recognised pathways through which autistic adults can obtain the support needed to exercise capacity before substitute decision-making is considered.

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[50] *CRPD* (n 1) art 12(3); *Disability Royal Commission* (n 11) vol 6, 179–82 rec 6.8. For existing Victorian mechanisms, see *GAA* Vic (n 8) s 5, pt 4; *Powers of Attorney Act 2014* (Vic) pt 7.
[51] *CRPD* (n 1) art 12(3); ALRC Report 124 (n 1) 93 [4.12]–[4.13].

A *Article 12, General Comment No 1 and the Support Duty*

Article 12 of the *CRPD* recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, requires States Parties to provide access to the support a person may require in exercising legal capacity and requires safeguards that respect the person's rights, will and preferences.[52] Its significance goes beyond rejecting incapacity based on disability status alone. Article 12 links legal personhood to a positive obligation to build conditions under which decisions can be made, communicated and acted upon.[53] For autistic adults, that starting point is important. Diagnosis, communication style, sensory distress, anxiety, executive-functioning difficulty or the need for processing time should not be treated as proxies for incapacity.[54] The legal question is what support is required for this person to exercise legal capacity in relation to this decision.

General Comment No 1 reads art 12 as requiring States to replace substitute decision-making regimes with supported decision-making arrangements that respect the person's rights, will and preferences.[55] The Committee distinguishes legal capacity from mental capacity, criticises the use of mental-capacity assessments to deny legal capacity and states that support in the exercise of legal capacity must respect the person's rights, will and preferences rather than operate as substitute decision-making.[56] It defines substitute decision-making broadly. The concept includes arrangements in which legal capacity is removed, even for a single decision; a decision-maker is appointed by someone other than the person concerned and this can be done against that person's will; or the substitute decision is based on what is believed to be an objective assessment of best interests rather than the person's will and preferences.[57] On this view, substitute decision-making regimes must be abolished and replaced with supported decision-making arrangements, rather than retained with additional safeguards.[58]

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[52] *CRPD* (n 1) art 12(2)–(4).
[53] Ibid art 12(3); *General Comment No 1* (n 1) 4–5 [17].
[54] Pia Bradshaw et al, 'Recognising, Supporting and Understanding Autistic Adults in General Practice Settings' (2021) 50(3) *Australian Journal of General Practice* 126, 127–9. For the domestic assessment approach, see ALRC Report 124 (n 1) 11–12 rec 3–2; Queensland Department of Justice and Attorney-General, *Queensland Capacity Assessment Guidelines 2020: A Guide to Understanding Capacity, Capacity Assessment and the Legal Tests of Capacity under Queensland's Guardianship Legislation* (Guidelines, Version 2, 7 April 2021) 10–12, 25, 39.
[55] *General Comment No 1* (n 1) 6 [26], [28].
[56] Ibid 3–4 [12]–[15], 4–5 [17], 5 [21].
[57] Ibid 6 [27].
[58] Ibid 6 [28].

General Comment No 1 also rejects the adult 'best interests' paradigm.[59] On the Committee's interpretation, art 12 requires States Parties to ensure that, where a person's will and preferences cannot be determined after significant efforts, decisions reflect the best interpretation of that person's will and preferences rather than what a third party regards as the person's best interests.[60] The Committee therefore treats equal legal capacity as incompatible with regimes that remove decision-making authority on the basis of impairment and substitute an externally assessed best-interests standard.

That distinction is important. *General Comment No 1* should be read on its own terms: it treats art 12 as requiring the abolition and replacement of substitute decision-making regimes, rather than their retention as measures of last resort. Australia has adopted a different position. Its interpretive declaration states that the *CRPD* permits fully supported or substituted decision-making arrangements where necessary, as a last resort and subject to safeguards.[61] A substantial pragmatic literature likewise argues that tightly confined representative mechanisms may remain legally or morally defensible in hard cases, including emergency treatment, exploitation, unconsciousness, legal uncertainty or serious disagreement about the person's will and preferences.[62] That view may be defended as a domestic and pragmatic response to art 12. It should not be attributed to the *CRPD* Committee.

This article does not seek to resolve the abolitionist–pragmatic debate. Its concern is narrower. While Australian law continues to retain substitute or representative orders, those orders should be preceded, reduced and constrained by formal pathways for support. Terminology matters. Supported decision-making describes arrangements in which the person remains the legal decision-maker, with assistance to understand information, consider options, communicate preferences and implement a decision.[63] Where another person is legally authorised to decide on the person's behalf, or where the person's legal authority depends on another person's

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[59] Ibid 5 [21].
[60] Ibid.
[61] United Nations Treaty Collection, 'Convention on the Rights of Persons with Disabilities' (Web Page) <https://treaties.un.org/> (Australia's declaration concerning art 12). See also Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 95: Review into Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008* (Report No 95, October 2008) ch 2.
[62] ALRC Report 124 (n 1) 58 [2.101], 60 [2.106]–[2.107]; Terry Carney, 'Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?' (2015) 4(1) *Laws* 37 ('Supported Decision-Making for People with Cognitive Impairments'); Terry Carney, 'Prioritising Supported Decision-Making: Running on Empty or a Basis for Glacial-to-Steady Progress?' (2017) 6(4) *Laws* 18:1; John Dawson and George Szmukler, 'Fusion of Mental Health and Incapacity Legislation' (2006) 188 *British Journal of Psychiatry* 504.
[63] See *General Comment No 1* (n 1) 4–5 [17]; ALRC Report 124 (n 1) 93 [4.12]–[4.13].

concurrence, the arrangement has moved beyond support into representative or substitute decision-making, even if it is respectful in design and guided by will and preferences.[64] Support and authority should therefore be kept analytically separate.

B *Australian Common Law Capacity Doctrine*

The domestic starting point is correspondingly nuanced. Australian common law does not treat capacity as a global on/off condition. The leading authority is *Gibbons v Wright*,[65] where the High Court held that the law does not prescribe a fixed standard of mental capacity for all transactions. Rather, for each legal act or 'piece of business', the person must have sufficient soundness of mind to understand the general nature of what they are doing.[66] Later authority has restated the same principle in more contemporary terms. In *Scott v Scott*, Lindsay J emphasised that capacity is assessed by reference to the nature, terms, purpose and context of the particular transaction.[67] *Ghosn v Principle Focus Pty Ltd [No 2]* likewise requires attention to an instrument's practical consequences and expressly treats that contextual approach as consistent with *Gibbons v Wright*.[68] The inquiry is therefore functional, temporal and decision-specific. It asks whether the person had the understanding required for the particular act at the relevant time, not whether they were globally capable or incapable. The presumption of capacity reinforces that approach, although the evidentiary burden depends on the legal act and the issues raised. In probate, for example, due execution of a rational will may support a presumption of testamentary capacity, but a genuine doubt requires the propounder to establish capacity. The inquiry remains contextual and evidentiary. It asks whether the person had the understanding required for the particular act, rather than treating disability as a legal status.[69]

The clearest illustration is testamentary capacity. *Banks v Goodfellow* ('*Banks*') asks whether the testator understood the nature and effect of making a will, the extent of the property being disposed of and the claims of those who might naturally expect

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[64] Michelle Browning, Christine Bigby and Jacinta Douglas, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 34 ('Supported Decision Making').
[65] *Gibbons* (n 9).
[66] Ibid 437 (Dixon CJ, Kitto and Taylor JJ). See also *Scott* (n 21) 327 [205] (Lindsay J); *CJ* (n 21) 30 [32] (Lindsay J).
[67] *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J).
[68] *Ghosn* (n 21) [69]–[70], [77]–[78] (Forrest J).
[69] See, eg, *Bull v Fulton* (1942) 66 CLR 295, 343 (Williams J) ('*Bull*') (on the probate presumption and the propounder's burden where a genuine doubt arises). On the general starting presumption in capacity assessment, see ALRC Report 124 (n 1) 72 [3.38].

to benefit, and whether any disorder of the mind affected the testamentary disposition.[70] Australian courts have long applied that test in a way that directs attention to the person's actual understanding of the particular act, rather than to diagnosis alone. A diagnosis, eccentricity, age, illness or vulnerability does not itself invalidate a will.[71] The question is whether the relevant impairment affected the specific act of will-making.[72] In *Carr v Homersham*, the NSW Court of Appeal emphasised that the negative *Banks* elements matter only to the extent that they interfere with actual decision-making; *Banks* is not a rigid statutory checklist.[73] Testamentary capacity thus already contains a sophisticated account of partial impairment, causal connection and decision-specific ability.

The same functional logic appears across other common law settings. Capacity to grant a power of attorney depends on the nature and consequences of the instrument, the powers conferred, the relationship between principal and attorney and the practical consequences of execution.[74] Capacity to consent to, or refuse, medical treatment turns on the person's ability to understand the nature and consequences of the decision; a competent adult may refuse treatment even where others regard the refusal as unwise or harmful.[75] Litigation capacity is calibrated to the proceeding in issue and requires understanding of the nature, purpose, possible outcomes and costs risks of the litigation.[76] Capacity to marry is assessed by reference to understanding the nature and effect of the marriage ceremony and relationship, not by reference to capacity for all legal purposes.[77] In the protective jurisdiction and financial management contexts, incapacity in one domain does not

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[70] *Banks v Goodfellow* (1870) LR 5 QB 549, 565 (Cockburn CJ) ('*Banks*').

[71] See, eg, ibid 570–1 (Cockburn CJ); *Bailey v Bailey* (1924) 34 CLR 558, 570–2 (Isaacs J, Gavan Duffy J agreeing at 579, Rich J agreeing at 579); *Timbury v Coffee* (1941) 66 CLR 277, 280 (Rich ACJ), 282–4 (Dixon J) ('*Timbury*'); *Bull* (n 69) 299–300 (Latham CJ); *Re Estate of Griffith*; *Easter v Griffith* (1995) 217 ALR 284, 290–2 (Gleeson CJ) ('*Re Estate of Griffith*'); *Carr v Homersham* (2018) 97 NSWLR 328, 330–3 [5]–[6], [15]–[17] (Basten JA) ('*Carr*'). *Bull* is cited for the need to connect the relevant delusions with the testamentary disposition, not as a decision upholding the will.

[72] *Timbury* (n 71) 282–4 (Dixon J); *Re Estate of Griffith* (n 71) 295–6 (Kirby P); *Hanna* (n 9) [54] (Beazley P, Macfarlan JA agreeing at [160] and White JA agreeing at [163]).

[73] *Carr* (n 71) 330–3 [5]–[6], [15]–[17] (Basten JA), 353 [132] (Leeming JA).

[74] *Szozda v Szozda* [2010] NSWSC 804, [119]–[120] (Barrett J) ('*Szozda*'); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J).

[75] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 94–5 [26]–[30], 97–8 [40] (McDougall J) ('*Hunter and New England Area Health Service*').

[76] *Dalle-Molle v Manos* (2004) 88 SASR 193, 198–200 [21]–[26] (Debelle J) ('*Dalle-Molle*').

[77] *Marriage Act 1961* (Cth) s 23B(1)(d)(iii) ('*Marriage Act*'); *Babich v Sokur* [2007] FamCA 236, [244], [249], [255] (Mullane J), quoted in *Oliver (Deceased) v Oliver* [2014] FamCA 57, [202] (Foster J) ('*Oliver (Deceased)*').

establish incapacity in all others; need, benefit and the availability of support remain separate questions.[78]

C. Why Doctrine Is Not Support Architecture

Three propositions follow. First, common law capacity doctrine is not diagnosis-based. Autism, dementia, intellectual disability, acquired brain injury or psychosocial disability may be relevant evidentiary context, but no diagnosis answers the legal question. Secondly, common law capacity doctrine is not binary in the pejorative sense sometimes attributed to it. A person may be able to make a will but not manage complex litigation; understand a limited power of attorney but not an instrument authorising wide dispositions; or make personal decisions while needing assistance with financial administration. Thirdly, the difficulty is therefore not that Australian law has failed to recognise functional capacity. It is that recognition of functional capacity is not consistently matched by practical and legally recognised support.

Article 12 and the common law therefore perform different roles in the analysis. Article 12 supplies the normative commitment to equal legal capacity and support. The common law supplies a transaction-specific doctrine for determining whether a particular legal act is valid. Neither, without more, creates a reliable legal pathway through which autistic adults can obtain recognised, autism-responsive support before substitute decision-making is considered. Statutory guardianship and tribunal practice are considered separately in Part IV because they raise different questions: the design of legislative powers, the criteria for intervention, the availability of support-sensitive orders and the way tribunals assess evidence, risk, informal support and less-restrictive alternatives in practice.

Common law capacity doctrine is mainly a validity doctrine. It determines, often retrospectively, whether a will, contract, consent, refusal, power of attorney, marriage or litigation step is legally effective.[79] It does not itself give a person extra time to process information, access to augmentative communication, a low-sensory

[78] *P v NSW Trustee and Guardian* [2015] NSWSC 579, [307]–[308] (Lindsay J); *CJ* (n 21) 30 [32]–[33], 31 [38], 33 [51], 34 [54]–[56] (Lindsay J).

[79] See, eg, *Banks* (n 70) 565 (Cockburn CJ) (wills); *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ) (transactions); *Hunter and New England Area Health Service* (n 75) 97–8 [40] (McDougall J) (medical consent and refusal); *Szozda* (n 74) [31], [119]–[120] (Barrett J); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J) (powers of attorney); *Marriage Act* (n 77) s 23B(1)(d)(iii); *Oliver (Deceased)* (n 77) [202] (Foster J) (marriage); *Dalle-Molle* (n 76) 198–200 [21]–[26] (Debelle J) (litigation).

hearing room, a trusted supporter whose role third parties must recognise or assistance implementing an otherwise valid decision.[80]

The next Part therefore examines whether Australian guardianship law, in principle and practice, supplies that missing pathway or instead reproduces the gap between recognising capacity and enabling its exercise.

IV AUSTRALIAN GUARDIANSHIP LAW IN PRINCIPLE AND PRACTICE

The difficulty in Australian guardianship law is not that Australian law has no concept of decision-specific capacity. That proposition is already recognised at common law and is increasingly reflected in modern guardianship statutes. This section therefore asks a narrower question: whether state and territory guardianship systems translate that recognition into formal, accessible and autism-responsive support pathways. The answer is mixed. Australian law reform has moved substantially towards supported decision-making, will and preferences, least-restrictive intervention and recognition of diversity. Some statutes now incorporate those ideas. Published tribunal practice, especially in NSW, also shows more nuance than a binary account allows. Yet most jurisdictions still leave autistic adults with a limited formal menu: informal support of uncertain legal effect, or guardianship and administration orders that transfer legal authority within the scope of the order. That is the remaining implementation gap.

A *Australian Law Reform and Statutory Trajectory*

Australia's guardianship laws are state and territory laws. They sit against the background of adult legal capacity at common law, but operate through statutory mechanisms for guardianship, administration or financial management.[81] Since Australia's ratification of the *CRPD*, Australian law reform has increasingly treated guardianship as a last-resort mechanism rather than the ordinary legal response to disability-related decision-making difficulty.[82]

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[80] Contrast the validity authorities cited above n 79 with the distinct sources of decision-making support, communication support and procedural accommodation: *CRPD* (n 1) arts 12(3), 13(1), 21; *Disability Discrimination Act 1992* (Cth) ss 4 (definition of 'reasonable adjustment'), 5(2), 6(2); ALRC Report 124 (n 1) 96–7 [4.29]–[4.32].

[81] Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report No 131, May 2017) 317–18 [10.3]–[10.4] ('ALRC Report 131'); *GA* NSW (n 12) pts 3–3A; *NSW Trustee and Guardian Act 2009* (NSW) ch 4. For the common law baseline, see *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ).

[82] ALRC Report 131 (n 81) 318 [10.5]; *Disability Royal Commission* (n 11) vol 6, 182–8 rec 6.9. This is the Australian reform position, distinct from *General Comment No 1*'s abolitionist interpretation discussed in Part III(A).

The Australian Law Reform Commission's ('ALRC') *Equality, Capacity and Disability in Commonwealth Laws*[83] remains the national starting point. The ALRC did not propose a crude binary model. It framed reform around four 'National Decision-Making Principles': the equal right to make decisions, access to support, decisions directed by will, preferences and rights, and safeguards.[84] It also distinguished between supporters, who assist a person to exercise legal capacity, and representatives, who may act only as a last resort and should be directed by the person's will, preferences and rights.[85] The significance of that framework for this article is twofold. First, it confirms that Australian law reform already recognises decision-making ability as support-sensitive and decision-specific. Secondly, it exposes the gap between principle and legal machinery: the ALRC principles are not self-executing and do not themselves create state and territory support pathways for autistic adults.

The *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* ('*Disability Royal Commission*') reinforced that direction. Volume 6 recommended movement away from substituted decision-making towards supported decision-making and identified guardianship and administration orders as measures that should be used only as a last resort, in the least restrictive way and in a manner directed by the person's will and preferences.[86] Recommendation 6.6 is particularly important because it expressly includes 'recognition of diversity' among supported decision-making principles.[87] For autistic adults, that principle should not be treated as rhetorical. It requires legal actors to attend to communication mode, sensory environment, processing time, executive-functioning demands, anxiety, the person's own views and the quality of support relationships before concluding that a substitute order is necessary.

The post-Royal Commission implementation picture remains incomplete. The 2024 government response and 2025 progress reporting show broad acceptance, acceptance in principle or further consideration of supported decision-making recommendations, but uneven state and territory progress on formal supporters, decision-making ability and representation orders.[88] This matters because high-level reform commitments have practical force only when translated into legal

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[83] ALRC Report 124 (n 1).
[84] Ibid 11 rec 3–1, 63 [3.2].
[85] Ibid 58 [2.101], 93–4 [4.12]–[4.14].
[86] *Disability Royal Commission* (n 11) vol 6, 165–92 recs 6.6–6.10.
[87] Ibid vol 6, 165–76 rec 6.6.
[88] Australian Government, *Australian Government Response to the Disability Royal Commission* (Response, 30 July 2024); Australian Government, *Disability Royal Commission Progress Report 2025* (Report, 27 November 2025) vol 6, recs 6.6–6.10 <www.health.gov.au/>.

mechanisms that require banks, hospitals, tenancy services and tribunals to recognise and engage with a supporter's role.

B *Statutory Architecture across Australian Jurisdictions*

A useful map of Australian guardianship legislation groups jurisdictions by statutory architecture rather than proceeding through eight separate narratives. The groupings are necessarily approximate, because each statute has its own history and detail. The relevant question for this article is not whether the jurisdiction uses the language of support or least restriction, but whether it provides a formal legal pathway for assistance short of substitute decision-making.

The first group is guardianship-centric: NSW, South Australia ('SA') and Western Australia ('WA').[89] In these jurisdictions, the central formal mechanisms remain guardianship and, where relevant, financial management or administration. Orders may be limited by function and duration, and tribunal practice may apply least-restrictive reasoning. But the statutory architecture does not provide a general low-intervention supporter status comparable to Victoria's supportive appointments. Once a guardian, administrator or financial manager is appointed, legal authority within the scope of the order is transferred to that decision-maker.[90] That is a statutory consequence, not a common law conclusion about global incapacity. It should therefore be described precisely: the person is not rendered incapable for all purposes, but their legal authority is displaced for the matters covered by the order.

NSW illustrates the point. The *Guardianship Act 1987* (NSW) requires attention to the person's welfare and interests, views, relationships and the practicability of services being provided without an order.[91] It also permits limited and reviewable orders. Yet NSW has not enacted the NSW Law Reform Commission's ('NSWLRC') proposed support agreements and tribunal support orders.[92] The result is a jurisdiction with a relatively nuanced tribunal practice, but a statute still organised around substitute appointment when informal or private arrangements are insufficient.

SA remains guardianship-centric in its current statutory architecture, but recent law reform work by the South Australian Law Reform Institute ('SALRI') has identified

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[89] *GA* NSW (n 12); *GAA* SA (n 12); *GAA* WA (n 12).
[90] *GA* NSW (n 12) ss 14, 16, 21(2A), 25G; *GAA* SA (n 12) ss 29, 33; *GAA* WA (n 12) s 43.
[91] *GA* NSW (n 12) ss 4, 14–16.
[92] Ibid ss 15(4), 16(1)(c), 16(2), 18, 25–25C, 25E(2), 25H, 25N–25P. Compare GA NSW (n 12) pts 3–3A with New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 72–8 recs 7.1–7.7, 81 rec 7.12 ('NSWLRC Report 145').

the need to move toward a more formal support-recognition model. SALRI did not purport to undertake a full review of the *Guardianship and Administration Act 1993* (SA), which it treated as a separate major exercise; rather, its report considers guardianship and administration in the broader context of supported decision-making. Its significance here is therefore normative and structural: SALRI's work supports embedding supported decision-making across SA law and practice, with substitute decision-making retained only as a necessary last resort and subject to appropriate safeguards.[93]

The second group is principles-based: Queensland, Tasmania, the Northern Territory ('NT') and the Australian Capital Territory ('ACT').[94] These jurisdictions more expressly reflect the modern functional approach. Their legislation presumes capacity, focuses on capacity for a matter and requires attention to whether the adult can decide with support or whether less-restrictive alternatives are available.[95] Queensland is the strongest example in this group. Its general principles require recognition of the adult's right to make decisions, support for participation, respect for existing supportive relationships and a structured sequence that seeks the adult's views, wishes and preferences before resorting to substituted judgment or other protective reasoning.[96] Tasmania, the NT and the ACT similarly contain capacity, support, participation and least-restrictive principles.[97]

The limitation of the principles-based model is that principle is not the same as a formal support order. A tribunal may be directed to consider support before appointing a guardian, but the person may still lack an authoritative, recognisable supporter who can obtain information, assist communication or help implement the person's decision in dealings with third parties. The ALRC's discussion of supporters' access to information and the *Disability Royal Commission's* recommendation for formal supporter appointments identify the legal machinery needed to address this problem.[98]

The third group contains only Victoria, whose legislation provides a distinct tribunal-based pathway for formally recognised decision-making support.[99] The

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[93] *GAA* SA (n 12) ss 29, 35; Sylvia Villios et al, *The Need for New Solutions? Establishing a Legal Framework for Supported Decision-Making to Empower Individuals with Impaired Decision-Making* (Report, South Australian Law Reform Institute, Adelaide, 2025) 75–6 [1.2.8]–[1.2.9], 102.
[94] *GAA* Qld (n 13); *GAA* Tas (n 13); *GAA* NT (n 13); *GMPA* ACT (n 13).
[95] See, eg, *GAA* Qld (n 13) ss 11, 11B, 12; *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4, 5, 5A; *GMPA* ACT (n 13) ss 4, 6A, 7.
[96] *GAA* Qld (n 13) ss 11, 11B, sch 1.
[97] *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4, 5, 5A; *GMPA* ACT (n 13) ss 4, 6A, 7.
[98] ALRC Report 124 (n 1) 96–7 [4.29]–[4.32]; *Disability Royal Commission* (n 11) vol 6, 181–2 rec 6.8.
[99] *GAA* Vic (n 8) pt 4.

Guardianship and Administration Act 2019 (Vic) introduced supportive guardianship and supportive administration, giving formal recognition to a person who supports the adult to make and give effect to decisions while the adult remains the decision-maker.[100] Victoria therefore partially operationalises decision-specific capacity in a way that other jurisdictions do not. It is, however, not a complete continuum. Supportive orders still depend on statutory thresholds and tribunal processes; they do not necessarily provide an easy light-touch authorisation for every adult who needs recognised assistance in ordinary transactions.[101] The practical operation of private supportive appointments requires further evaluation. Victoria is therefore a valuable model, but not a complete solution.

C *Tribunal Practice: Capacity, Need, Informal Support and Risk*

Tribunal practice complicates the statutory map. Guardianship statutes provide the legal architecture, but tribunals determine whether orders are made, limited, reviewed, revoked or allowed to lapse. Published decisions must be used cautiously. NCAT publishes only a selection of Guardianship Division decisions, so those decisions are evidence of published practice rather than an exhaustive account of all tribunal work.[102] Even with that limitation, the published NSW cases are important because they answer overstated accounts of NSW practice.

The central point is that published NCAT decisions do not support a claim that NSW simply or automatically imposes substitute decision-making orders, or displaces a person's decision-making authority, once disability or diagnosis is identified. NCAT often distinguishes between capacity, need, risk, informal support and the particular decision domain. In financial management matters, it applies a practical functional test: whether the person can manage their affairs in a reasonably competent, rational and orderly way, having regard to present and prospective needs and risks.[103] In guardianship matters, the Tribunal asks whether the person is someone for whom an order can be made, whether an order should be made, what functions are needed and whether services can practicably be provided without an order.[104] That method is statutory and tribunal-based; it is not the same as common law capacity doctrine, although it is consistent with the broader legal rejection of global incapacity.

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[100] Ibid ss 79, 87, 90–4.
[101] Office of the Public Advocate (Vic), *Reflections on Guardianship: The Law and Practice in Victoria* (Report, 2023); 'Supportive Guardians and Supportive Administrators', *Victorian Civil and Administrative Tribunal* (Web Page) <www.vcat.vic.gov.au/>.
[102] 'Published Decisions' (n 16). See *GA* NSW (n 12) ss 4, 14–16, 25G.
[103] *GKC [No 2]* (n 16) [45].
[104] *GA* NSW (n 12) ss 14–16.

The autism-specific decisions are especially useful. In *GKC [No 2]*,[105] NCAT allowed a guardianship order concerning a 19-year-old autistic man to lapse and revoked a financial management order. The Tribunal accepted that GKC continued to need support, but concluded that he could make important life decisions with trusted informal assistance and that his practical financial capacity had improved.[106] The case is a direct answer to any suggestion that autism diagnosis itself leads to guardianship or financial management. It also supports this article's deeper claim; the decisive question was whether supports enabled the person to exercise decision-making agency.

MKF points in the same direction, although in a narrower sense.[107] There, NCAT accepted that MKF's severe autism spectrum disorder, epilepsy and intellectual disability prevented him from making important life decisions, so that he was a person for whom an order could be made. The Tribunal nevertheless dismissed the guardianship application because informal and statutory supports were operating, services could practicably be provided without an order, medical and dental consent could be dealt with through the 'person responsible' framework, and there were no current decisions requiring guardian intervention.[108] The disability was significant, but necessity for a guardianship order was not established. By contrast, *Vivian (a pseudonym)* shows that NCAT may still intervene where risk is acute.[109] The Tribunal made a six-month, limited guardianship order for an adult with autism and borderline personality disorder, but the order was confined to travel and passport functions.[110] *Vivian (a pseudonym)* therefore shows both the continuing coercive potential of the NSW regime and the Tribunal's capacity to tailor orders to specific risks.

Other NSW decisions reinforce the separation between incapacity and necessity. In *Samantha (a pseudonym)*, NCAT dismissed both guardianship and financial management applications despite cognitive impairment and current decision-making incapacity in relevant domains because enduring appointments were already in place and functioning appropriately.[111] In *KGN*, the Tribunal made a limited guardianship order for services, health care and medical and dental consent, but dismissed the financial management application because finances were being

[105] *GKC [No 2]* (n 16).
[106] Ibid [18]–[19], [37]–[39], [50]–[61].
[107] *MKF* [2022] NSWCATGD 25, [11]–[13] ('*MKF*').
[108] Ibid [18]–[20], [30]–[32].
[109] *Vivian (a pseudonym)* [2025] NSWCATGD 4, [22]–[32].
[110] Ibid [44]–[46].
[111] *Samantha (a pseudonym)* [2024] NSWCATGD 26, [83]–[87], [100]–[102].

managed adequately with informal assistance.[112] In *DKK*, the Tribunal declined guardianship because it was not persuaded, on the current evidence, that the person was in need of a guardian, and because neighbours, friends and family could support personal decision-making needs, although financial management was still ordered.[113] These decisions show that the Tribunal may treat informal support, enduring appointments and domain-specific functioning or domain-specific need as real alternatives to broader intervention.

The dementia and Alzheimer's decisions are equally important because they reinforce a central point: autism should not be contrasted with dementia or intellectual disability in a way that implies those diagnoses ordinarily entail global incapacity. In *Laura (a pseudonym)*, NCAT dismissed a financial management application despite an early-stage Alzheimer's diagnosis, focusing on preserved executive functioning, the person's ability to explain her affairs and available formal and informal support.[114] In *JHN*, the Tribunal dismissed both guardianship and financial management applications where current clinical evidence and the Tribunal's own observations supported retained decision-making ability notwithstanding earlier concerns about dementia and alcohol use.[115] Those cases demonstrate the same anti-diagnostic principle that this article argues should be applied carefully to autism: diagnosis is evidentiary context, not a legal conclusion.

This does not mean that tribunal practice supplies a complete answer. Published cases also show that risk, conflict, exploitation concerns, medical urgency, travel concerns and service deadlock may be relevant and, in some cases, may justify formal orders.[116] The person's wishes and preferences may be recorded and weighed, but in NSW they remain embedded in a protective statutory framework rather than a pure will-and-preferences model of the kind favoured by *General Comment No 1*.[117] For autistic adults, the practical concern is how evidence is gathered and interpreted. Silence, distress, avoidance of eye contact, rigidity,

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[112] *KGN* [2024] NSWCATGD 23, [1]–[2], [79]–[80].

[113] *DKK* [2023] NSWCATGD 19, [11]–[14], [20]–[24].

[114] *Laura (a pseudonym)* [2025] NSWCATGD 12, [105]–[108], [111]–[112].

[115] *JHN* (n 16) [18]–[22], [31]–[33].

[116] See, eg, *Zoe (a pseudonym)* [2025] NSWCATGD 7, [59], [66]–[74], [119]–[125] (neglect, control, alleged financial abuse and intermingled finances); *Victoria (a pseudonym)* [2025] NSWCATGD 14, [76]–[80], [83]–[90] (family conflict and informal decision-making difficulties); *Sophie (a pseudonym)* [2026] NSWCATGD 2, [94]–[98] (medical treatment delay and formal consent order); *Vivian (a pseudonym)* (n 109) [22]–[32], [44]–[46] (urgent travel risks and travel/passport functions); *TQX* [2016] NSWCATGD 56, [17]–[26] (NDIS access and service arrangements); *FKT* [2020] NSWCATGD 96, [11]–[12], [24]–[25] (family conflict impeding informal decision-making about services, health care, accommodation and access).

[117] *GA* NSW (n 12) s 4. Cf *General Comment No 1* (n 1) 5 [21].

dependence on routines, reliance on trusted supporters or difficulty answering rapid questions may be misread as incapacity unless the tribunal asks whether the decision-making environment itself is disabling.[118] Conversely, verbal fluency may obscure serious executive-functioning difficulty. The tribunal decisions nevertheless show why current, domain-specific and communication-sensitive evidence matters. *GKC [No 2]* is instructive because current evidence, including written submissions, trusted supporter evidence and the person's own presentation, displaced older material that no longer reflected his functioning.[119] The point is not that NCAT lacks functional concepts, but that functional concepts depend on evidence quality, current assessment and autism-sensitive procedure.

The tribunal cases should therefore be used for a precise proposition. They do not prove that NSW or other Australian systems already provide adequate supported decision-making. Published decisions are only a partial window into practice, and tribunal mitigation depends on evidence quality, party resources, available supporters and the Tribunal's understanding of disability.[120] They do show, however, that the Australian problem is not conceptual ignorance of decision-specific capacity. Nor is it simply a failure to recognise informal support in individual cases. It is the absence of a consistent legal pathway through which a person who requires support, but not substitute authority, can obtain recognised assistance without resorting to guardianship.

D *The Remaining Implementation Gap*

The remaining gap is therefore not conceptual but institutional. Australian common law recognises decision-specific capacity; modern statutes increasingly incorporate support-sensitive principles; and published tribunal decisions show that orders may be refused, narrowed, revoked or allowed to lapse where supports are sufficient. But none of those features creates a general right to formal decision-making support.

The reform question is therefore how Australian law can move from capacity recognition to capacity access: from asking whether a person can decide unaided, to providing formal, graduated and autism-responsive mechanisms through which the

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[118] Bradshaw et al (n 54) 127–8; Cummins, Pellicano and Crane (n 30) 683–7; Luke et al (n 6) 618–19. For procedural guidance rather than empirical evidence, see Australian Guardianship and Administration Council, *Guidelines for Australian Tribunals: Maximising the Participation of the Person in Guardianship Proceedings* (Guidelines, 20 June 2019) 4 guidelines 3–4, 5 guidelines 11–13, 6 guidelines 16, 23–4; Judicial Commission of New South Wales (n 37) [5.6.6.3]–[5.6.6.6].
[119] *GKC [No 2]* (n 16) [17]–[26], [37]–[39].
[120] 'Published Decisions' (n 16).

person can decide with support. That is the gap to which the comparative and reform sections now turn.

V Operationalising Decision-Specific Capacity across the Spectrum of Support Need

For autistic adults, the implementation gap is acute. What is distinctive in the autism context is the profile of barriers that may obstruct the exercise or assessment of capacity. An autistic adult may be able to understand and decide where information is written, concrete and provided in advance; where options are sequenced; where time for processing is available; where sensory demands are reduced; where anxiety is not intensified by adversarial questioning; and where a trusted supporter can assist communication without taking over the decision.[121] Conversely, the same adult may appear confused, rigid, avoidant, distressed or non-responsive in a rushed, noisy or unfamiliar environment. That presentation should not be converted into incapacity unless the decision-maker has first considered whether the environment, communication method and available supports are disabling the decision-making process.[122]

A spectrum-responsive inquiry should therefore be practical and decision-specific. It should ask: what is the decision; what information must be understood, retained, used or weighed; how does this person communicate most reliably; what sensory, temporal and social conditions enable participation; what role do existing supporters play; can the person decide with support; what legal recognition does that support require; and is any more restrictive arrangement necessary? These questions preserve the common law insight that capacity is transaction-specific, while translating it into an operational method for tribunals, lawyers, clinicians and service providers.[123]

Informal support will remain central. Many autistic adults rely on parents, partners, siblings, friends, advocates, support workers or trusted professionals to gather information, compare options, regulate anxiety, organise documents, communicate

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[121] Autism Spectrum Australia (Aspect), Submission No 4 to Parliament of New South Wales, *Inquiry into Supported Decision-Making for Adults with Disability and Older People in NSW* (4 March 2026) 2, 5–6; New South Wales Department of Communities and Justice (n 43) 42–4, 147–53; ALRC Report 124 (n 1) 93–4 [4.12]–[4.14], 104 [4.65]–[4.66]; *Disability Royal Commission* (n 11) vol 6, 17–18 rec 6.7, 391–2 rec 6.32.

[122] Vella et al (n 2); Adams and Malone (n 6); de Marchena et al (n 6).

[123] *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *PBU & NJE* (n 9) 186–7 [148]–[151] (Bell J); *GAA* Vic (n 8) ss 5, 8, 30–1; ALRC Report 124 (n 1) 11–12 rec 3–2.

decisions and implement choices.[124] Tribunal practice shows that such support can be legally significant. It may justify refusing, limiting, lapsing or revoking formal orders.[125] Yet informal support is fragile. It may be unavailable, conflicted, unstable, geographically distant, abusive or unrecognised by third parties. It may fail precisely where legal recognition matters most: when a bank will not discuss accounts, a health service will not speak with a supporter, a landlord requires authority, a university or employer insists on formal documentation or a government agency demands proof of power.[126] The law should not make the presence of a competent family member the functional substitute for a right to support.

The purpose of a spectrum-responsive model is to fill that gap without collapsing support into guardianship. At the lightest level, an adult who retains decision-making authority but needs help accessing, organising, understanding or communicating information should be able to appoint a recognised supporter. At an intermediate level, where the person can participate meaningfully but cannot reliably complete some decisions alone, legislation might provide a tribunal support order, structured support arrangement or carefully defined co-decision mechanism confined to specified matters and subject to safeguards. But terminology matters. A tier of more intensive support is not the same thing as a transfer of legal authority. Under *General Comment No 1*, supported decision-making must not be redescribed to include substitute decision-making; if another person is legally authorised to decide for the adult, or if the adult's decision depends on another person's concurrence for legal effect, the arrangement is representative, co-decision or substitute decision-making, not pure support.[127] Australia's interpretive position and pragmatic scholarship may defend narrowly confined representative mechanisms as a last resort, but that is a contested domestic position, not the *CRPD* Committee's view.[128]

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[124] Commonwealth Department of Social Services, *National Autism Strategy 2025–2031* (Strategy, January 2025) 9–10, 22–3; ALRC Report 124 (n 1) 67–9 [3.18]–[3.28], 93–4 [4.12]–[4.15]; Bigby, Whiteside and Douglas (n 48) 397–8, 405–7.

[125] *GA* NSW (n 12) ss 4, 14(2), 15(4), 25C, 25P; *LBL* [2016] NSWCATGD 22; *SAQ* [2016] NSWCATGD 47; *LGT* (n 23) [10]–[15], [21]–[24], [31]–[34]; *TLS* [2017] NSWCATGD 15, [8]–[15], [19], [21]–[29] ('*TLS*'); Christine Fougere, *Guardianship, Financial Management and the NDIS: NCAT's Experience* (Paper, Australian Guardianship and Administration Council Heads of Tribunal Meeting, Hobart, 23 March 2017) 20–1 [78]–[82], 28–9 [106]–[112].

[126] ALRC Report 124 (n 1) 96–7 [4.29]–[4.32], 187–9 [6.150]–[6.159]; *TLS* (n 125) [19], [28]; Fougere (n 125) 29 [109]–[112].

[127] *General Comment No 1* (n 1) 4–5 [17], 6 [27]–[28]; Browning, Bigby and Douglas, 'Supported Decision Making' (n 64).

[128] United Nations Treaty Collection (n 61) (Australia's declaration concerning art 12); ALRC Report 124 (n 1) 58 [2.101], 60 [2.106]–[2.107]; Carney, 'Supported Decision-Making for People with Cognitive Impairments' (n 62).

This article therefore uses tiering cautiously. The Canadian models considered later are not evidence that Canada has solved the problem, nor are they a template for transplantation into Australia's tribunal-centred guardianship systems. Their value is illustrative: selected Canadian statutes show how legal systems can create a more graduated menu between unrecognised informal assistance and full guardianship.[129] An Australian model would need to be adapted to state and territory legislation, public guardian and public trustee institutions, tribunal procedures, Commonwealth disability services and existing local reform proposals.

Decision-specific capacity must be matched with decision-specific support. A reformed framework should ensure that autistic adults are not abandoned because they are considered "too capable" for guardianship, nor unnecessarily restrained because no lesser formal support option exists. The aim is to support the person, for the decision, in the conditions in which legal agency can actually be exercised.

VI CANADIAN DESIGN INSIGHTS

Canada remains a useful comparator. The relevant Canadian regimes are not a single "Canadian model" capable of direct transplantation into Australian guardianship law. They are provincial and territorial statutory experiments which occupy the space between informal assistance and formal guardianship in different ways. The constitutional analogy is limited. Canadian provincial adult-capacity law rests largely on provincial responsibility for property and civil rights and the administration of justice, while the Yukon exercises devolved territorial authority.[130] Australian guardianship and administration law is likewise principally subnational, but it is administered primarily through state and territory tribunals, public guardians and public trustees, not through the same court-centred structures that

[129] See, eg, *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, ss 2, 4, 6, 13, 26, 33, 46, 54–6, 87–101; *Adult Protection and Decision Making Act*, SY 2003, c 21, sch A, ss 2–6, 11, 14–15, 23, 25, 32, 37–8; *Representation Agreement Act*, RSBC 1996, c 405, ss 2–3, 7–10, 16, 36; *Supported Decision-Making and Representation Act*, SNB 2022, c 60, ss 2–3, 6, 17–30, 34–50; *General Regulation — Supported Decision-Making and Representation Act*, NB Reg 2023-66, ss 5, 8, 11, forms 1–3. See also the comparative discussion in Part VI below.

[130] Victorian Law Reform Commission, *Guardianship* (Consultation Paper No 10, 2010) 120–1 [7.25]–[7.33], 129 [7.84]–[7.87] ('VLRC Consultation Paper'); Krista James and Laura Watts, *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Commissioned Paper, Law Commission of Ontario, March 2014) 4–6, 23–34. On the constitutional allocation, see *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 92(13)–(14) ('*Constitution Act 1867*'); *Yukon Act*, SC 2002, c 7, ss 18(1)(j)–(k).

feature in many Canadian comparators. The comparison is therefore one of legislative design, not institutional identity.[131]

That qualification is important for this article's thesis. The point is not that Canadian law reveals a doctrine of spectrum-based capacity unknown to Australia. Earlier parts of this article have shown that Australian common law already treats capacity as decision-specific, functional and contextual, and that tribunal practice may refuse, confine, review or end orders where support is sufficient or necessity is not established. The remaining problem is statutory architecture: many Australian regimes still provide no clear formal pathway for an adult who requires legally recognised support but does not require substitute decision-making. The Canadian material is useful because selected statutes show how support can be graduated without assuming that all adults must be placed either outside the legal system or under guardianship.[132]

Alberta provides the clearest illustration. Its *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 distinguishes supported decision-making authorisations, co-decision-making orders, guardianship, specific decision-making and trusteeship.[133] At the least restrictive level, an adult who remains capable of making personal, non-financial decisions may authorise a supporter to access relevant information and assist the adult to make and communicate decisions.[134] That tool is useful for autistic adults who retain decision-making authority but require assistance with organising information, communicating choices, managing executive-function demands or dealing with service providers. At the intermediate level, a co-decision-making order permits a court-appointed co-decision-maker to work through specified personal decisions with the adult, while the adult remains the final decision-maker.[135] Guardianship and trusteeship are more restrictive court

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[131] *Constitution Act 1867* (n 130) ss 92(13)–(14), 96–101; *Australian Constitution* ss 51, 109, 122; ALRC Report 131 (n 81) 317–18 [10.3]–[10.4].

[132] See, eg, *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32].

[133] *Adult Guardianship and Trusteeship Act* (n 129) pts 2–4; 'Supported Decision-Making'; 'Co-Decision-Making'; 'Adult Guardianship'; 'Trusteeship', *Government of Alberta* (Web Page) <www.alberta.ca/>.

[134] *Adult Guardianship and Trusteeship Act* (n 129) ss 2(c), 3, 4(1)–(2), 6(1)–(2), 9(1); VLRC Consultation Paper (n 130) 120–1 [7.28]–[7.29]. For the autism-specific need for structured and communicative support, see Luke et al (n 6) 618–19; *Autism Spectrum Disorder in Adults* (n 3) 31 rec 1.6.3.

[135] *Adult Guardianship and Trusteeship Act* (n 129) ss 12, 13(4)(a)(ii)–(iii), 13(4)(c), 13(5), 15, 17(1)–(2), 17(5), 18(1)–(2), 18(4)–(5); VLRC Consultation Paper (n 130) 121 [7.30]–[7.32]; James and Watts (n 130) 5–6, 26–7.

orders and should not be described as supported decision-making merely because they may be accompanied by duties to consider the adult's wishes.[136]

The value of Alberta's approach should not be overstated. Its supported and co-decision-making mechanisms are principally directed to personal, non-financial decisions; financial matters are dealt with separately.[137] Its co-decision-making and more restrictive orders are court-based, involve capacity assessment and may involve cost and delay; the voluntary supporter authorisation is not itself a court order.[138] Nor does its existence answer the art 12 debate. *General Comment No 1* rejects substitute decision-making, and co-decision-making may itself be controversial where legal effect depends on another person's concurrence.[139] Alberta is therefore best treated as a useful example of graduated statutory drafting, not as proof that tiering alone produces *CRPD* compliance.

The Yukon offers a different form of continuum. The *Adult Protection and Decision Making Act*, SY 2003, c 21, sch A, enacted as sch A to the *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, provides for supported decision-making agreements, representation agreements and guardianship.[140] The Yukon material is useful because it requires attention to less-restrictive arrangements before guardianship and because it recognises that adults may need legally recognised support short of a full guardianship order.[141] However, the Yukon's middle mechanism should not be assimilated to Alberta-style co-decision-making. A representation agreement may authorise decisions to be made on the adult's behalf and is therefore closer to representative decision-making than to a model in which the adult remains the sole legal decision-maker.[142] It supports the case for graduated tools, but not the stronger claim that all Canadian middle tiers preserve legal agency in the same way.

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[136] *Adult Guardianship and Trusteeship Act* (n 129) ss 26, 33, 46, 54–6. See also 'Adult Guardianship' (n 133); 'Trusteeship' (n 133).

[137] See *Adult Guardianship and Trusteeship Act* (n 129) ss 1(o), 1(bb), 3, 4(2), 9(1), 12, 17(1)–(2), 22(1), 44(1), 46(5), 55(1); Victorian Law Reform Commission, *Guardianship* (Final Report No 24, 2012) 153 [9.8]–[9.9] ('VLRC Final Report').

[138] See *Adult Guardianship and Trusteeship Act* (n 129) ss 13(1)–(2), 13(4)–(5), 17(6)–(7), 20, 21(1), (3); Centre for Public Legal Education Alberta, *The Adult Guardianship and Trusteeship Act* (Booklet, 2019) 14–17.

[139] *General Comment No 1* (n 1) 6 [27]–[28]; *Adult Guardianship and Trusteeship Act* (n 129) ss 17(5), 18(5); VLRC Final Report (n 137) 153 [9.8]–[9.9], 156 [9.28]–[9.30].

[140] *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, sch A; *Adult Protection and Decision Making Act* (n 129) pts 1–3.

[141] *Adult Protection and Decision Making Act* (n 129) ss 2(c)–(d), 4–6, 10–11, 14, 32(1)(c), 37(1)(b).

[142] Compare *Adult Protection and Decision Making Act* (n 129) ss 14, 15(2), 18, 25 with *Adult Guardianship and Trusteeship Act* (n 129) ss 13(4)(a)(ii), 17(1)–(2), 18(2), (4)–(5). Cf the supportive functions in *Adult Protection and Decision Making Act* (n 129) ss 5(2), 11.

British Columbia should also be treated separately. Its *Representation Agreement Act*, RSBC 1996, c 405, is not a simple two-tier guardianship model. A standard agreement under s 7 may authorise a representative to help an adult make decisions, or to make decisions on the adult's behalf, in relation to personal care, routine financial affairs, health care and some legal services.[143] Section 8 is especially significant: an adult may make a s 7 agreement even though incapable of making a contract, managing health care, personal care or legal matters or managing routine financial affairs. The assessment instead attends to matters such as communication of desire, demonstration of choices and preferences, awareness that the representative may make decisions affecting the adult and a relationship of trust.[144] This relational and communication-sensitive threshold has obvious relevance for autistic adults, particularly where capacity may be obscured by non-conventional communication or environmental barriers. But more intrusive intervention in British Columbia occurs through different mechanisms, including broader s 9 agreements and court-appointed committeeship under the *Patients Property Act*, RSBC 1996, c 349, ss 2–3. British Columbia is therefore better understood as a planning and representation regime alongside committeeship, not as a complete ladder from support to guardianship.

New Brunswick provides the most recent of the comparators considered here. Its *Supported Decision-Making and Representation Act*, SNB 2022, c 60, in force from 1 January 2024, expressly seeks to protect and promote autonomy and dignity and creates a three-level framework of decision-making assistance, supported decision-making orders and representation orders.[145] That framework supplies useful contemporary drafting language for Australian reform. It also confirms the importance of distinguishing assistance and support from representation.[146] However, New Brunswick's jurisprudence is still developing.[147]

Three design insights follow. First, a voluntary supporter authorisation can give third parties a legally recognisable role without any finding of incapacity. Secondly, a tribunal-made support or co-decision order could occupy the missing middle for adults who need formal, reviewable assistance but should remain the primary

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[143] *Representation Agreement Act* (n 129) ss 1 (definition of 'representation agreement'), 2, 7(1)(a)–(d), 8–10.
[144] Ibid ss 8(1)(a)–(c), 8(2)(a)–(d).
[145] *Supported Decision-Making and Representation Act* (n 129) ss 2–3, 6, 17–30, 34–50. See also General Regulation — *Supported Decision-Making and Representation Act* (n 129).
[146] See *Supported Decision-Making and Representation Act* (n 129) ss 2–4, 6, 10(5), 20–2, 27–8, 36–9. For the Australian distinction between support and representation, see *Disability Royal Commission* (n 11) vol 6, 179–88 recs 6.8–6.9.
[147] *Denton v Léger* [2026] NBCA 44, [34], [43]–[45] (LaVigne JA for the Court).

decision-maker. Thirdly, where Australian law retains guardianship, administration or representation, those orders should be decision-specific, time-limited, reviewable and preceded by reasons explaining why voluntary and structured support would not meet the need.[148] The Canadian lesson, then, is not adoption. It is adaptation: Australian jurisdictions should translate their existing commitment to decision-specific capacity into tribunal-compatible, autism-responsive and graduated legal tools.

VII A Tribunal-Adapted Australian Reform Model for Autistic Adults

Australian reform should therefore proceed by adapting the design insight of graduated support to Australian tribunal systems. The model should be statutory, state- and territory-based and administered through existing guardianship tribunals, rather than through a new superior court process.

The first tier should be a voluntary supporter authorisation. This would be a statutory instrument made by an adult who wants legally recognised assistance but does not require a finding of impaired capacity. It would resemble, but not simply copy, the personal supporter arrangements proposed by the NSWLRC and the formal supporter model recommended by the *Disability Royal Commission*.[149] The adult would remain the legal decision-maker. The supporter's authority would be facilitative: to obtain and receive information, explain options, assist with communication, organise documents, attend meetings, help implement decisions and communicate the adult's will and preferences to third parties. The supporter would have no authority to decide, veto, consent, contract or transact on the adult's behalf unless another lawful instrument separately conferred that power.

This tier is especially important for autistic adults whose support needs are real but not accurately characterised as incapacity. An autistic adult may be able to make a health, tenancy, financial or service decision if information is provided in writing, options are structured visually, adequate processing time is given, sensory load is reduced and a trusted person assists with communication or executive-functioning demands.[150] A voluntary authorisation would give banks, hospitals, landlords, universities, government agencies and service providers a clear legal basis to deal with the supporter without forcing the adult into guardianship. It should be low-cost, revocable, capable of being limited by decision domain and registrable or

[148] *Disability Royal Commission* (n 11) vol 6, recs 6.7–6.10; *GAA* Vic (n 8) ss 30(2), 31, 34, 159; *Supported Decision-Making and Representation Act* (n 129) ss 20(1)(d), 21–2, 32, 36(2), 37(1)(c), 38–9, 49.
[149] NSWLRC Report 145 (n 92) chs 5–6; *Disability Royal Commission* (n 11) vol 6, recs 6.6–6.10.
[150] Vella et al (n 2); Luke et al (n 6); Adams and Malone (n 6).

otherwise readily verifiable. Its safeguards should include witness requirements, plain-language explanation, conflict-of-interest disclosure, a prohibition on self-dealing, record-keeping where the supporter deals with third parties and a simple tribunal pathway for suspension or cancellation where abuse, undue influence or breakdown of trust is alleged.

The second tier should be a tribunal-made support order. This would occupy the space between purely voluntary support and guardianship. It would be available where informal or voluntary arrangements are insufficient because third parties refuse to cooperate, records cannot be accessed, family conflict obstructs implementation or the adult requires a more structured and reviewable support arrangement. The order should still preserve the adult as the decision-maker. Its functions might include providing authority for a named supporter to receive specified information, attend specified meetings, assist communication with service systems, help prepare and lodge documents or support implementation of a decision already made by the adult. The order should be confined to specified matters, such as NDIS planning, accommodation, health care, education, employment services or routine financial administration, and should not operate as general guardianship by another name.

A tribunal support order should require positive findings directed to support rather than incapacity. The tribunal should identify the decision or decision-domain, the adult's preferred communication method, the supports already available, the barriers that make voluntary support insufficient and the reasons why a support order is less restrictive than guardianship or administration. This structure reflects what published tribunal practice already sometimes does well. In cases such as *GKC [No 2]* and *MKF*, informal support and the absence of present need were central to refusing or ending formal orders;[151] *Vivian (a pseudonym)* illustrates that where intervention is made, it can be narrow and time-limited.[152] Those cases do not prove that Australian practice is uniformly rights-protective. They show that tribunals already have some of the analytic tools required for a graduated model. The reform proposed here would make those tools express, transparent and consistently available.

If a jurisdiction adopts a co-decision order in addition to a support order, it should do so cautiously. A co-decision model may be useful where the adult can participate meaningfully but needs another person formally joined in a legally significant process. However, if the adult's legal act has no effect without the other person's

[151] *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32].
[152] *Vivian (a pseudonym)* (n 109) [44]–[46].

concurrence, the arrangement risks moving beyond support into a restriction on legal agency. The statute should therefore state whether the co-decision-maker merely assists, whether concurrence is required for validity and how disagreement is resolved. Any such order should be rare, decision-specific, time-limited, subject to review and accompanied by reasons explaining why a less-restrictive support order is insufficient. It should not be described as uncontroversially compliant with *General Comment No 1*.

The third tier should be a constrained representative or guardianship order. This tier exists only because Australian domestic law presently retains guardianship and administration. It should not be labelled supported decision-making. It should be available only where the tribunal is satisfied, on current functional evidence, that the adult cannot make or communicate the relevant decision even with appropriate support and that no voluntary supporter authorisation, tribunal support order, enduring appointment, informal arrangement or service adjustment can meet the need. The order should be confined to the particular decision or function that justifies it, expressed in the least restrictive terms and reviewed within a short period unless there are compelling reasons for a longer order.

The statute should also require a written "support exhaustion" finding before any representative order is made. That finding should identify the supports considered, the supports attempted where practicable, why those supports failed or would be inadequate and why the representative function is necessary. The decision-making standard should be will and preferences, not objective best interests. Where the adult's actual will and preferences cannot be determined after serious efforts, the representative should be required to act on the best interpretation of will and preferences, subject to a narrowly drawn serious-harm exception under domestic law.[153] Such an exception is a feature of the proposed domestic model, not an exception endorsed by *General Comment No 1*. This formulation would align more closely with the *Disability Royal Commission*, the ALRC's supporter/representative distinction and Victoria's more recent will-and-preferences orientation, while acknowledging that retained substitute decision-making remains contested under art 12.[154]

The model must also be autism-responsive in procedure and evidence. A tribunal should not assess capacity or support need until it has first considered whether the

[153] For the best-interpretation standard, see *General Comment No 1* (n 1) 5 [21]. The serious-harm exception is a proposed domestic safeguard: cf *GAA* Vic (n 8) s 9(1). It is not attributed to the Committee as permission to retain substitute decision-making.

[154] ALRC Report 124 (n 1) 11 rec 3–1; *GAA* Vic (n 8) ss 8–9; *Disability Royal Commission* (n 11) vol 6, recs 6.6–6.10.

adult has had a meaningful opportunity to participate. At minimum, legislation or rules should require accessible information before the hearing; permission to use augmentative and alternative communication; written questions or agendas in advance where practicable; breaks; remote or hybrid attendance; low-sensory hearing arrangements; and the presence of a trusted supporter unless there is a demonstrated conflict or risk. Silence, distress, limited eye contact, reliance on routine, delayed response, masking, shutdown or dependence on a trusted supporter should not be treated as incapacity without analysis of the communication and environmental context.[155] Conversely, verbal fluency should not be treated as conclusive proof that no support is needed.

Evidence requirements should be equally important. Tribunals should prefer current, decision-specific and functional evidence over diagnostic labels or stale assessments. Expert reports should be asked to identify what supports were used during assessment, what communication method was relied upon, whether the environment was accessible and whether the adult's performance changed when information was presented differently. Where autism is relevant, evidence should address sensory load, processing time, anxiety, executive functioning, communication modality, service-system complexity and the role of trusted supporters. The reasons for decision should expressly state that diagnosis is not determinative, identify the decision domain, explain the support options considered and justify the legal effect of the order chosen.

These safeguards would not eliminate hard cases. Nor would they remove the need for funding, advocacy, training and service cooperation. Supported decision-making cannot be created by legislation alone. It depends on skilled supporters, responsive institutions and practical recognition by the agencies with which adults deal. But a tribunal-adapted statutory pathway would reduce the present all-or-nothing pressure. Autistic adults who need structured support would not be left to informal arrangements of uncertain legal effect. Nor would they be pushed prematurely into guardianship merely because no lesser formal order exists. The purpose of the model is therefore modest but significant: to operationalise decision-specific capacity through decision-specific support, while reserving representative authority for the rare cases in which domestic law still permits it and no less-restrictive arrangement can meet the need.

[155] See Vella et al (n 2); Kapp (n 33); Donaldson, corbin and McCoy (n 6).

VIII CONCLUSION

This article began with a practical problem, not a claim of doctrinal novelty. Australian law already contains important resources for autonomy. At common law, capacity is presumptive, functional and decision-specific.[156] In several guardianship statutes, decision-making ability is assessed by reference to the particular matter, available supports and less-restrictive alternatives.[157] In published tribunal practice, orders may be refused, limited, allowed to lapse or revoked where the evidence shows capacity with support, or no present need for formal intervention.[158] That legal recognition is significant. It is not, however, the same as a support architecture.

The remaining gap is operational. Autistic adults may require assistance not because they lack global intellectual capacity, but because ordinary legal, medical, financial and service systems often demand communication styles, sensory tolerance, processing speed and executive organisation that do not fit autistic ways of deciding.[159] A person may be able to understand and communicate a decision with written information, time, sensory adjustment, augmentative communication or a trusted supporter, yet appear unable to do so in a rushed, oral or adversarial setting. The law therefore risks both over-protection and under-support: some adults may be moved towards guardianship because no lesser formal pathway exists; others may be left with informal support that third parties need not recognise.

Selected Canadian regimes are useful. They do not supply a transplantable model for Australia's federal, state and territory tribunal-based systems. They do, however, illustrate how law may recognise voluntary support, structured support or co-decision-making and tightly confined representative authority as distinct legal tools.[160] An Australian model should be adapted to local guardianship legislation and tribunal practice: voluntary supporter appointments without a finding of incapacity; tribunal-made support orders where informal assistance is insufficient; and, only where domestic law continues to permit it, time-limited and reviewable representative orders directed by the person's will and preferences so far as they can be ascertained.

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[156] See, eg, *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J); *Banks* (n 70) 565 (Cockburn CJ).
[157] See, eg, *GAA* Qld (n 13) ss 11, 11B; *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4–5A; *GAA* Vic (n 8) ss 5, 30, 79, 87, 90–4.
[158] *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32]; *Vivian (a pseudonym)* (n 109) [44]–[46]; *Laura (a pseudonym)* (n 114) [105]–[108], [111]–[112].
[159] Luke et al (n 6); Vella et al (n 2).
[160] *Adult Guardianship and Trusteeship Act* (n 129); *Adult Protection and Decision Making Act* (n 129); *Representation Agreement Act* (n 129); *Supported Decision-Making and Representation Act* (n 129).