BEYOND "ANY RISK IS UNACCEPTABLE": THE LIKELIHOOD LIMB UNDER DIRECTION NO 110

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This article examines the proper construction and application of Primary Consideration 1 ("protection of the Australian community") under Direction No 110, made pursuant to section 499 of the Migration Act 1958 (Cth), with a focus on paragraph 8.1.2(2)(b)'s requirement to "have regard to" the likelihood of further criminal or other serious conduct. It argues that lawful decision-making under sections 501 and 501CA of the Migration Act 1958 (Cth) demands a cumulative, time-stamped evaluation of (a) the nature of potential harm and (b) the individualised likelihood of future conduct, informed by offence-free time in the community and rehabilitation achieved as at the time of decision. Reconciling Feutrill J in RNSQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1111 with Banks-Smith J in Jattan v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 866 ('Jattan') and the preference of the Full Court of the Federal Court of Australia in RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 108 ('RDYQ'), the article contends that decision-makers must substantively engage with the likelihood limb without any requirement to quantify risk or deploy rigid "low/moderate/high" scales. It identifies recurrent legal errors—allowing seriousness to operate as an automatic trump, reciting risk factors without evaluation, and overlooking the temporal lens—and proposes a targeted redraft of paragraph 8.1.2(2)(b) that would require an express (but non-quantified) evaluative finding, enumerate probative inputs, and anchor the assessment to the correct time. Model reasoning is offered to operationalise the reform and enhance transparency, consistency, and reviewability in Tribunal and ministerial practice. The overarching thesis is that compliance turns not on numbers but on substance: a reasoned, evidence-linked prediction of future conduct weighed against harm severity in line with the Direction's sliding-tolerance premise.

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I Introduction

This article addresses the proper construction and application of Primary Consideration 1—"protection of the Australian community"—under Direction No 110 made pursuant to section 499 of the *Migration Act 1958* (Cth), with particular focus on paragraph 8.1.2(2)(b)'s requirement that decision-makers "have regard to" the likelihood of further criminal or other serious conduct. Against the statutory background of sections 501 and 501CA—covering discretionary refusal/cancellation, mandatory cancellation, and the revocation regime—the article identifies a recurrent reasoning error: treating the seriousness of past conduct as an automatic trump while failing to make a real, time-stamped evaluation of future risk grounded in evidence of re-offending and rehabilitation as at the time of decision. It contends that lawful compliance demands a cumulative assessment of (a) the nature of potential harm and (b) the likelihood of further serious conduct, calibrated by the Direction's sliding-tolerance premise that as potential harm becomes graver, the community's tolerance for any risk correspondingly decreases.

The article situates this construction issue within recent jurisprudence. It explains that while Feutrill J in *RNSQ*[1] underscores the necessity of an actual, individualised assessment of likelihood, Banks-Smith J in *Jattan*[2] clarifies that the Direction does not oblige decision-makers to express that assessment in quantified or formulaic terms; the Full Court of the Federal Court of Australia ('Full Court') in *RDYQ*[3] prefers that approach.

Read together, these authorities require transparent engagement with the likelihood limb without mandating percentages or rigid "low/moderate/high" categorisations. The analysis then distils what compliant reasons should disclose—an active intellectual process that links probative material (offence-free time in the community, rehabilitation achieved by decision time, expert assessments, and protective factors) to a qualitative prediction about future risk, and only then weighs that prediction with the gravity of potential harm in accordance with paragraph

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[1] *RNSQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1111 [73]-[74], [77] ('*RNSQ*').

[2] *Jattan v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 866 [66] ('*Jattan*').

[3] *RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 108 [15] ('*RDYQ*').

8.1.2(1).

Finally, the paper foreshadows a practical solution. To improve legality, consistency, and reviewability, it proposes a targeted redraft of paragraph 8.1.2(2)(b) that would require an express evaluative finding on likelihood (while eschewing quantification), enumerate the probative inputs that must be addressed, and fix the correct temporal lens ("as at" the time of decision).

The remainder of the paper proceeds in four parts: Part II outlines the statutory regime (ss 501 and 501CA); Part III summarises Direction No 110 and its primary and other considerations; Part IV analyses the construction problem and reconciles the authorities; and Part V discusses the correct construction of paragraph 8.1.2(2)(b) and Part VI sets out the proposed reform and model reasoning, before concluding with implications for Tribunal and Ministerial decision-making practice.

II The Statutory Regime

Section 501 of the *Migration Act 1958* (Cth) empowers the Minister (or a delegate) to refuse a visa[4] if the applicant does not satisfy the Minister that they pass the "character test", and to cancel a visa[5] on similar grounds if the Minister reasonably suspects the person does not pass the test and the person fails to satisfy the Minister otherwise.

Separately, the Minister personally may refuse or cancel a visa if the Minister reasonably suspects the person does not pass the character test and is satisfied refusal or cancellation is in the national interest;[6] for that personal power, the rules of natural justice do not apply. The Act also provides for mandatory cancellation where a person is serving a full-time custodial sentence and fails the character test because of a specified substantial criminal record (certain limbs) or child-sex offences; natural justice likewise does not apply to such a mandatory cancellation.[7] If the Minister exercises the personal power, a notice must be tabled in each House of Parliament within 15 sitting days, subject to specified exceptions

[4] *Migration Act 1958* (Cth) s 501(1).
[5] Ibid s 501(2).
[6] Ibid s 501(3).
[7] Ibid s 501(3A).

(including certain character-test bases and ASIO assessments).[8]

Section 501CA establishes the revocation framework that applies when a visa has been mandatorily cancelled under section 501(3A) while the person is serving a sentence of imprisonment. It defines "relevant information" (excluding non-disclosable information) as information the Minister considers would be a reason, or part of a reason, for the original decision and that is specifically about the person (or another person), not merely about a class of persons.[9]

As soon as practicable after making the original decision, the Minister must give the person written notice setting out the decision and particulars of the relevant information, and invite representations about revocation within the period and manner prescribed by the regulations; the notice must be given in the prescribed way.[10] The Minister may revoke if the person makes representations in accordance with the invitation and the Minister is satisfied either that the person passes the character test or that there is another reason to revoke.[11]

If revocation occurs, the original decision is taken never to have been made; any detention between the cancellation and revocation remains lawful and gives rise to no claim.[12] A decision not to exercise the power to revoke is not reviewable by application under Part 5, and notification requirements for non-revocation decisions are addressed in section 501G.[13]

III Direction No 110

Direction No 110[14] is a ministerial direction made under section 499 of the *Migration Act 1958* (Cth) by the Minister for Immigration, Citizenship and

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[8] Ibid s 501(4A).
[9] Ibid s 501CA(2).
[10] Ibid s 501CA(3).
[11] Ibid s 501CA(4).
[12] Ibid s 501CA(5).
[13] Ibid s 501CA(7).
[14] *Minister for Immigration, Citizenship and Multicultural Affairs (Cth),* Direction No 110 — Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA (7 June 2024) [5.1(4)] ('Direction No 110').

Multicultural Affairs[15] on 7 June 2024; it commenced on 21 June 2024 and revoked Direction No 99 from that date. It guides decision-makers exercising powers to refuse or cancel visas under section 501 and to consider revocation of mandatory cancellation under section 501CA, and must be complied with under section 499(2A).[16]

It explains the Act's objectives[17] and the role of the character test (s 501(6)), the discretionary refusals/cancellations in section 501(1)–(2), and the mandatory cancellation regime in section 501(3A) with a revocation pathway in section 501CA. The Direction defines "family violence" and "forced marriage" and clarifies that "serious conduct" can include non-criminal behaviour (e.g., inciting hatred, intimidatory conduct, contempt for the law, or serious immigration breaches).

It sets out overarching principles: Australia's sovereign right to regulate entry/stay; the safety of the Australian community as the highest priority; low tolerance for criminal/serious conduct by short-stay or recent arrivals but potentially higher tolerance for those long resident; and that some conduct—especially family violence—may warrant refusal/cancellation even where measurable risk of physical harm is not shown.[18]

When making a decision, primary considerations generally carry greater weight than other considerations;[19] "protection of the Australian community" generally carries the greatest weight.[20] The five primary considerations are: (1) protection of the Australian community; (2) whether the conduct constituted family violence; (3) the strength, nature and duration of ties to Australia; (4) the best interests of minor children in Australia; and (5) expectations of the Australian community.[21]

Under "protection of the Australian community," decision-makers assess (a) the nature and seriousness of past conduct and (b) the risk of future harm.[22] Very serious conduct includes violent and/or sexual crimes, crimes

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[15] Now known as the Minister for Immigration and Citizenship.
[16] Direction No 110 (n 14) [5.1(4)].
[17] Ibid [5.1].
[18] Ibid [5.2].
[19] Ibid [7(2)].
[20] Ibid [7(2)].
[21] Ibid [8].
[22] Ibid [8.1(2)].

of a violent/sexual nature against women or children, and acts of family violence; serious conduct includes forced marriage (other than as a victim), crimes against vulnerable people or government officials, conduct enlivening opinion-based character-test grounds, and crimes committed in or around immigration detention.[23]

Other mandatory factors include victim impact, frequency and escalation, cumulative effect, false or misleading information, re-offending after warnings, and how foreign offences align with Australian law.[24] For future risk, decision-makers weigh the potential harm and likelihood of further serious conduct, considering evidence of re-offending risk and rehabilitation (with weight to time in the community since the most recent offence).[25]

Family-violence cases require particular attention to frequency, cumulative effect, rehabilitation, acceptance of responsibility and understanding of impact (especially on children).[26] Ties to Australia cover effects on immediate family with an indefinite right to remain, length of residence (including arrival as a child), positive contribution, and the strength/duration of social and family links;[27] best-interests factors for children include relationship nature/duration, future parenting role, impacts of separation, other carers, the child's views, and any exposure to violence or trauma.[28]

The "expectations of the Australian community" primary consideration recognises that the community expects refusal/cancellation where serious character concerns arise (e.g., family violence, forced marriage, serious crimes against women/children/other vulnerable people, crimes against officials, trafficking/people smuggling/serious international crimes, and worker exploitation), and this applies regardless of measurable risk. Decision-makers proceed on the Government's articulated view rather than independently polling community expectations.[29]

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[23] Ibid [8.1.1(1)].
[24] Ibid.
[25] Ibid [8.1.2].
[26] Ibid [8.2].
[27] Ibid [8.3].
[28] Ibid [8.4].
[29] Ibid [8.5].

Other considerations include: (a) legal consequences (liability to detention and removal under sections 189 and 198, noting section 197C(1));[30] (b) Australia's non-refoulement obligations and their interaction with protection findings (s 197C) and bars such as sections 48A/501E;[31] (c) the extent of impediments the person would face if removed (age/health, language/cultural barriers, and social/medical/economic support);[32] and (d) impacts on Australian business interests (with employment links usually relevant only where a major project or important service would be significantly compromised).[33]

IV The Construction Problem

Paragraph 8.1 of Direction No 110 requires decision-makers to prioritise protection of the Australian community, with paragraph 8.1.2 stating that this should be done by adopting the Government's view that tolerance for any future-harm risk decreases as the potential harm grows; some conduct is so serious that even a small risk of repetition is unacceptable.[34]

In assessing risk, they must consider cumulatively: (a) the nature of harm that would result if the non-citizen were to re-offend or engage in other serious conduct;[35] and (b) the likelihood of that occurring, having regard to evidence on re-offending risk and to rehabilitation achieved by the time of decision, giving weight to time spent in the community since the most recent offence (noting decisions should not be delayed for rehabilitative courses).[36] Where the question is whether to refuse a visa grant, they should also consider whether risk is affected by the duration and purpose of the intended stay, the visa type, and whether strong or compassionate reasons exist to allow a short-stay visa.[37]

There have been competing jurisprudential constructions in relation to paragraph 8.1.2(2)(b). In *RNSQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1111, the applicant, a Portuguese

[30] Ibid [9.1].
[31] Ibid [9.1].
[32] Ibid [9.2].
[33] Ibid [9.3].
[34] Ibid [8.1.2(1)].
[35] Ibid [8.1.2(2)(a)].
[36] Ibid [8.1.2(2)(b)].
[37] Ibid [8.1.2(2)(c)].

citizen who entered Australia aged eight and has deep family ties here, had his visa mandatorily cancelled in November 2019 following a 14-month sentence for possession of 2,431 child exploitation material ('CEM'). After an initial non-revocation decision was quashed on judicial review, a delegate again refused to revoke in June 2022. This decision was affirmed by the Administrative Appeals Tribunal ('AAT') in August 2022. The applicant has remained in immigration detention since October 2020. The judgment sets out that statutory framework (ss 501(3A), 501CA and Direction No 90) and the primary/other considerations to be weighed on revocation (protection of the community, family violence, best interests of minor children, expectations of the Australian community; non-refoulement, impediments, victims, community links).[38]

The AAT treated the offending as very serious and, under Primary Consideration 1, concluded that viewing CEM is so harmful that the "level of tolerable risk … is nil", such that "nothing turns" on whether expert evidence rated the applicant's risk low, moderate or high. The AAT then found protection of the community and expectations of the community weighed "very strongly" against revocation, notwithstanding that the best interests of his two minor children and his Australian ties weighed strongly in favour.[39]

The applicant's grounds before the Federal Court of Australia ('FCA') complained, in substance, that the AAT failed to engage with Dr Watts' (clinical psychologist) uncontested evidence that "you can never say anyone is no risk", and thereby failed to perform the Direction No 90 task of assessing the likelihood of future offending as part of the risk analysis; alternatively, its conclusion that only "nil" risk is acceptable was illogical/irrational.[40]

Justice Feutrill held the Tribunal erred by not making any finding about the actual likelihood of re-offending as required by paragraph 8.1.2(2)(b) of Direction No 90, concluding that "any risk is unacceptable" addresses only the nature/seriousness limb but not the mandatory likelihood limb; the degree of likelihood matters to the weight to be given to protection of the community in the ultimate balance (a small yet unacceptable risk differs

[38] *RNSQ* (n 1) [1]-[6], [7]-[17], [18]-[21], [46]-[49].
[39] Ibid [20]-[29], [31]-[33], [39]-[44], [47]-[49].
[40] Ibid [51]-[56].

from a moderate unacceptable risk). Because the AAT's "very strongly against" weighting under primary consideration 1 was reached without a risk finding, the error was material and jurisdictional.[41]

So, Feutrill J concluded what matters in the assessment of the risk to the Australian community is not *how* the risk of harm is assessed or evaluated but that there is an *actual* assessment and evaluation undertaken of that risk.[42] That assessment and evaluation cannot be undertaken properly and in accordance with Direction No 90 without the decision-maker assessing and evaluating the likelihood of the particular non-citizen engaging in further criminal or serious conduct.[43]

An opposite conclusion was reached in *Jattan v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 866. Justice Banks-Smith allowed Mr Jattan's judicial review of the AAT's refusal to revoke the mandatory cancellation of his Special Category Visa under section 501(3A), quashed the AAT's 9 November 2023 decision and remitted it to a differently constituted Tribunal, with costs to be paid to pro bono counsel.

The Court recorded that Jattan, a 41-year-old New Zealander who has lived in Australia since age 22, had his visa mandatorily cancelled on 1 September 2021; a delegate refused revocation on 16 August 2023; the AAT affirmed on 9 November 2023; and the AAT proceeding was unrepresented.[44]

The case turned on two questions: (1) whether the AAT complied with Direction No 99 paragraph 8.1.2(2)(b) by actually assessing the likelihood of further harm (Ground 1); and (2) whether the AAT erred by treating "Form 1" offences—offences taken into account under the NSW sentencing scheme with no conviction recorded—as convictions (Ground 3).[45]

On Ground 1, her Honour held the AAT's reasons for decision failed to disclose the evidence or materials underpinning its asserted "likelihood" findings at TR [74], [75] and [77(c)], and that this did not meet Direction

[41] Ibid [63]-[72], [80]-[81].
[42] Ibid [73].
[43] Ibid [73].
[44] Ibid [1]-[4].
[45] Ibid [5]-[7].

No 99's requirement to evaluate likelihood under paragraph 8.1.2(2)(b); that failure was a jurisdictional error and, in light of *LPDT*, material; Ground 1 was upheld.[46]

Ground 2 (complaint about the AAT's weighing exercise) was rejected: the Tribunal's approach was distinguished from *CRNL*[47] and *VZWF*;[48] Ground 2 dismissed.[49]

On Ground 3, the Court found the AAT repeatedly treated four Form 1 offences as convictions—using the inflated "number of convictions" to characterise seriousness, calculate a rate of offending, and describe the "most significant offending"—so the error permeated the reasoning and could have affected the outcome; Ground 3 was upheld.[50]

Consequently, the application was allowed and the matter remitted as noted above, with costs under rule 4.19 in favour of pro bono counsel.[51]

So, Banks-Smith J concluded that Direction No 99 does not require the Tribunal to make an express finding concerning the likelihood of the applicant of further offending.[52] Nor, having regard to *Chen*,[53] is the Tribunal required to provide an estimate of the likelihood of reoffending.[54] Justice Banks-Smith downplayed any requirement to state such a prediction.

Feutrill J in *RNSQ* treats the "risk to the Australian community" as necessarily involving a predictive element: it is not enough to speak in generalities about risk; the decision-maker must assess and evaluate the likelihood that this non-citizen will engage in further criminal or serious

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[46] Ibid [75]-[77].
[47] *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138.
[48] *VZWF v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1160.
[49] Ibid [89]-[93].
[50] Ibid [157]-[158].
[51] Ibid [159]-[160].
[52] Ibid [66].
[53] *Chen v Minister for Immigration and Border Protection* [2017] FCA 4 [65], [68].
[54] *Jattan* (n 2) [66].

conduct.[55]

In contrast, Banks-Smith J in *Jattan* downplays any requirement to state such a prediction. It says Direction No 99 does not oblige the Tribunal to make an express finding about likelihood, nor to provide any quantitative "estimate" of reoffending.[56]

The tension lies in the level of articulation required. Feutrill J implies that a lawful application of the Direction is defective if the decision-maker does not grapple with, and evaluate, the individualised likelihood of future offending;[57] Banks-Smith J indicates that reasons will not be legally inadequate merely because they omit an explicit or numerical likelihood finding.[58]

The views can be reconciled to a degree: there must be a real (qualitative) evaluation of the prospect of further offending (Feutrill J), but it need not be couched as a standalone, quantified "likelihood" finding (Banks-Smith J). Practically, robust reasons should still show an individualised, evidence-based prediction—even if not expressed as a percentage or formal "express finding"—to satisfy both strands of authority.

The approach adopted by Banks-Smith J in *Jattan* appears to have been endorsed in *RDYQ*. There, the Full Court (Murphy, Abraham, and McEvoy JJ) concluded that the reasoning in *Jattan* (at [66]), in relation to the relevantly identical Direction No 99, is to be preferred.[59]

In *RNSQ and Minister for Immigration, Citizenship and Multicultural Affairs* [2025] ARTA 465, citing *Jattan*, the Minister contended that the Tribunal must have regard to the likelihood that the applicant will reoffend, but it does not need to make express findings or estimate the level of risk.[60] The Tribunal did not squarely address that submission but concluded that the applicant presents a low risk of reoffending.[61]

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[55] *RNSQ* (n 1) [73]-[74], [77].
[56] *Jattan* (n 2) [66].
[57] *RNSQ* (n 1) [73]-[74], [77].
[58] *Jattan* (n 2) [66].
[59] *RDYQ* (n 3) [15].
[60] *RNSQ and Minister for Immigration, Citizenship and Multicultural Affairs* [2025] ARTA 465 [77].
[61] Ibid [84].

V Correct Construction

Directions No 99 and Direction 110 are identical in relation to paragraph 8.1.2. Accordingly, the jurisprudence discussed earlier is of equal importance in construing paragraph 8.1.2(2)(b) of Direction No 110.

First, the text sets both a policy premise and a mandatory evaluative task. Paragraph 8.1.2(1) states the premise: community tolerance for risk drops as the seriousness of potential harm rises; some conduct is so grave that any risk of repetition may be unacceptable. Paragraph 8.1.2(2) then imposes the task in mandatory terms: decision-makers "must have regard to, cumulatively" (a) the nature of the harm and (b) the likelihood of further criminal or other serious conduct, informed by (i) evidence about risk of reoffending and (ii) evidence of rehabilitation by the time of decision, with weight to time spent in the community since the most recent offence (and an express note that decisions are not to be delayed to allow rehabilitative courses to be undertaken). Read together, the text requires a real assessment of likelihood and harm, and it must be done by the time of decision.

Secondly, this structure explains why the two strands of authority in *RNSQ* and *Jattan* are complementary, not competing. Feutrill J in *RNSQ* emphasises that there must be an actual assessment and evaluation of the risk to the Australian community that includes an assessment of the non-citizen's likelihood of further offending.[62] That insistence flows directly from the mandatory "must have regard to … likelihood" language in paragraph 8.1.2(2)(b). A decision-maker who does not grapple with likelihood has not discharged the statutory-direction task.

Thirdly, Banks-Smith J in *Jattan* addresses how that engagement must be expressed: Direction No 99 (relevantly identical to Direction No 110 for paragraph 8.1.2) does not require a discrete, formulaic or quantified "express finding" (e.g., 10%, 30%, "low/medium/high") about the level or degree of risk. Nothing in paragraph 8.1.2(2) stipulates a numeric estimate or a standalone conclusion; it demands reasoned engagement, not probabilistic calibration.[63] Thus, reasons satisfy the Direction where they show—by inference from the discussion—that the decision-maker

[62] *RNSQ* (n 1) [73]-[74], [77].
[63] *Jattan* (n 2) [66].

weighed the likelihood limb and the harm limb together.[64]

Fourthly, "cumulatively" matters.[65] The Direction requires an integrated weighing, not two siloed boxes. Because paragraph 8.1.2(1) lowers tolerance as seriousness rises, a lower likelihood can still justify an adverse outcome if the potential harm is catastrophic (e.g., lethal violence, terrorism, predatory offending).

Conversely, where the potential harm is less grave and rehabilitation by the time of decision is compelling, even a non-zero likelihood may be compatible with a favourable outcome. An analysis that addresses only likelihood (e.g., "low risk, therefore fine") or only harm (e.g., "very serious, therefore deny" without engaging with likelihood and rehabilitation) misapplies the cumulative instruction.

Fifthly, paragraph 8.1.2(2)(b)(ii) has two practical consequences that often go missing in reasons and therefore generate error: (1) the assessment is time-stamped—it must evaluate rehabilitation achieved by the time of decision, giving weight to time in the community since the most recent offence; and (2) decision-makers are cautioned not to delay decisions to let courses finish. So, reasons should explain how elapsed offence-free time in the community and current rehabilitative proof (programs completed, supervision compliance, clinical evidence, relapse prevention) have been factored into the likelihood assessment now.

Sixthly, properly understood, the "no express/quantified finding required" line of authority[66] is not a licence for cursory reasoning. It does not permit: bare assertions of "low risk/high risk" without linking evidence to conclusion; treating seriousness as an automatic trump without engaging with rehabilitation and time in the community; or reciting risk factors without evaluation. The reasons must reveal an active intellectual process that connects the evidence (including any risk assessments, program reports, urine screens, parole compliance, stable accommodation/employment, prosocial supports) to a conclusion about likelihood, then weighs that conclusion with the nature of the potential harm in light of paragraph 8.1.2(1).

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[64] *RDYQ* (n 3) [15].
[65] Direction No 110 (n 14) [8.1.2(2)(b)].
[66] *RDYQ* (n 3) [15].

Seventhly, what suffices? A compliant set of reasons will typically: (i) identify the kinds of harm that would materialise on relapse and why they are grave or otherwise; (ii) evaluate the person-specific likelihood of further offending (drawing on both risk-of-reoffending material and demonstrated rehabilitation as at decision time); (iii) explain the interplay required by paragraph 8.1.2(1) (e.g., "even a low likelihood is unacceptable given the catastrophic harm in this offending category" or "given sustained rehabilitation and the moderated harm profile, the residual likelihood does not warrant an adverse outcome"); and (iv) where the context is refusal to grant (not cancellation), address the short-stay qualifier in paragraph 8.1.2(2)(c) if engaged.[67] None of this requires a percentage; it requires transparent engagement.

Eighthly, what would be error? Reasons will miscarry where, for example, (a) they never assess likelihood at all; (b) they dismiss rehabilitation with a stock phrase without addressing what has been achieved by the time of decision and the time in the community factor; (c) they rely solely on the index offending's seriousness to the exclusion of the likelihood limb; or (d) they recite risk evidence but make no evaluative findings from it. Any of those would contradict the mandatory text of paragraph 8.1.2(2).

Ninthly, the "short-stay" factor in paragraph 8.1.2(2)(c) is context-specific: it applies where the question is whether to refuse to grant a visa. It does not generally apply in cancellation or revocation contexts. Its presence in the paragraph reinforces that the Direction is about contextualised risk: duration and purpose of stay, visa type, and compassionate reasons may affect how the likelihood-and-harm calculus is finally resolved for short-term entrants. Again, there is no requirement to quantify; there is a requirement to explain.

The correct construction is: (1) an actual, reasoned evaluation of likelihood and nature of harm is mandatory and must reflect rehabilitation as at the time of decision and time in the community (Feutrill J's emphasis);[68] (2) there is no requirement to state a discrete, "express" or quantified finding about the level/degree of risk (Banks-Smith J's clarification and the

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[67] *Singh and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1953 [62]-[88].
[68] *RNSQ* (n 1) [73]-[74], [77].

approach preferred in *RDYQ*);[69] and (3) compliance turns on whether the reasons show that likelihood was substantively grappled with and weighed cumulatively with harm in line with paragraph 8.1.2's sliding-tolerance premise.

Despite there being no mandatory obligation to do so, recent jurisprudence in the Administrative Review Tribunal has been for decision-makers to expressly assess whether an applicant poses a low, moderate or high risk of re-offending for the purposes of paragraph 8.1.2(2)(b).[70]

VI Reform of Paragraph 8.1.2(2)(b) of Direction No 110

In *RDYQ*, the Full Court suggested it would have been preferable for the Tribunal to refer explicitly to the requirement in paragraph 8.1.2(2)(b) to have regard to the likelihood of the non-citizen engaging in further criminal or other serious conduct.[71] A clear and express finding as to the likelihood of the non-citizen engaging in further criminal or other serious conduct would also have been desirable.[72] Nonetheless, the Full Court made clear that paragraph 8.1.2(2)(b), as currently drafted, does not require the Tribunal to make an express finding concerning the likelihood of the non-

[69] *Jattan* (n 2) [66]; *RDYQ* (n 3) 108 [15].

[70] *Mesui and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2025] ARTA 1987 [70] (real risk); *RBSS and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1968 [52] (low risk); *Kurth and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1971 [75] (low to moderate); *Thompson and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1930 [61] (low to moderate); *NKMX and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1925 [30] (unlikely to reoffend); *Singh and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1953 [86] (low likelihood); *Johnstone and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1851 [96] (moderate risk); *Mitchell and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1872 [75] (moderate likelihood); *Udemba and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 1916 [60] (low risk).

[71] *RDYQ* (n 3) [13].

[72] Ibid [13].

citizen engaging in further criminal or other serious conduct.[73] The requirement is that the Tribunal "have regard to" that consideration.[74]

Against that backdrop, this section proposes a redraft of paragraph 8.1.2(2)(b) in Direction No 110. In considering this matter, the decision-maker must (1) make an express evaluative finding on the likelihood of further offending as at the time of decision; (2) base that finding on all probative material, including (a) information and evidence concerning risk of reoffending—such as offending history and patterns, compliance on bail or parole, supervision reports, correctional and police material, and any expert risk assessments—and (b) evidence of rehabilitation achieved by the time of decision, giving primary weight to time spent offence-free in the community since the most recent offence and to demonstrated protective factors such as stable accommodation, employment, treatment engagement, prosocial supports, and verified abstinence from substances; (3) explain how contrary evidence has been resolved, including any limitations of tools or reports relied upon; (4) recognise that quantification is not required, though where descriptive categories are used the reasons must identify the category adopted and why; and (5) avoid delaying the decision to permit course completion while taking into account rehabilitation already achieved and any verifiable interim progress.

This redraft removes jurisprudential ambiguity by requiring a real, reasoned likelihood finding while making clear that neither a percentage nor a formulaic, quantified statement is demanded.[75] It ties the analysis to the correct temporal lens by insisting the assessment be made as at the time of decision, thereby steering decision-makers away from stale or purely historical snapshots. It corrects common practical errors by directing primary weight to offence-free time in the community—rather than behaviour in custody—and by enumerating the typical sources of probative input so that reasons are anchored in evidence rather than bare assertion.

The formulation also improves transparency and reviewability. By obliging the decision-maker to explain how conflicting material is resolved and to acknowledge the limitations of any instruments or reports, it curbs boilerplate recitation and demonstrates an active intellectual process. At the

[73] Ibid.
[74] Ibid.
[75] Ibid [15].

same time, it preserves the current prohibition on delaying determinations simply to complete courses,[76] while ensuring that achieved rehabilitation and verified interim progress are still properly considered.

To standardise expression without compelling quantification, a short non-operative guidance could accompany the paragraph. It would note that, if descriptors are used, decision-makers should employ consistent terms—such as very low (remote), low (real but less than balanced probabilities), moderate (real and not remote), and high (more likely than not)—and should avoid "no risk" unless the evidence truly eliminates plausible scenarios. Where paragraph 8.1.2(1) is invoked to treat even a low likelihood as unacceptable because potential harm is grave, the reasons should say so expressly and explain why.

For implementation, a model reasons paragraph could read as follows: "I have made an express evaluative finding on likelihood as at today's date. Drawing on the offending history, supervision and police material, and the expert assessment, together with rehabilitation now achieved—including [X] months offence-free in the community, verified treatment engagement, stable housing and employment, and prosocial supports—I find the likelihood of further serious conduct is [descriptor, if used]. I have considered and resolved contrary evidence as set out above and note the limitations of the [named tool/report]. I do not quantify the risk. I then weigh this likelihood with the nature of the potential harm in accordance with paragraph 8.1.2(1)."

Paragraph 8.1.2(2)(b) of Direction No 110, as currently drafted, is the very provision that has given rise to the competing constructions discussed above.[77]

"Weighting" in this context means explaining why identified inputs push the likelihood prediction up or down. The decision-maker should avoid rigid taxonomies (e.g., "low/moderate/high") unless a label is already embedded in the evidentiary record—if used, the label must be translated into reasons by identifying the evidence and logic that justify it for this

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[76] Direction No 110 (n 14) [8.1.2(2)(b)(ii)].

[77] *RNSQ* (n 1) [73]-[74], [77] and, by contrast, *Jattan* (n 2) at [66]. See also *RDYQ* (n 3) 15]; *Chen v Minister for Immigration and Border Protection* [2017] FCA 46 [65] and [68].

applicant.

Expert and psychological opinions are probative where they: (i) address current risk at the time of decision; (ii) engage with the applicant's actual relapse-prevention context (housing, employment, supports); and (iii) explain methodology and limitations. Tools with population-level baselines (e.g., actuarial screens) should be treated as inputs, not outcomes. Where experts conflict, the decision should state which opinion is preferred and why (scope, recency, data quality, cross-checks with collateral material), and then re-anchor the ultimate prediction as the delegate's own evaluative finding rather than outsourcing it to any instrument.

A practical constraint on prescribing more granular "risk frameworks" is transparency. While clearer guidance can improve legality and reviewability, the Department may resist publication of internal matrices or heuristics where disclosure could enable gaming or weaken public protection claims.

Australian public law recognises legitimate confidentiality interests (including public-interest immunity) in operational detail that, if revealed, could frustrate statutory objectives.[78] The preferred position in this paper does not require disclosure of any confidential internal tool. Rather, it requires a qualitative, time-stamped evaluative finding on likelihood, grounded in identified, case-specific inputs already available to the applicant and review bodies. This approach preserves transparency of reasons without compelling transparency of internal algorithms. Where a decision-maker has relied on internal guidance, the duty of intelligible justification is satisfied by articulating the material considerations and reasoning path in the public-facing decision, not by exhibiting any confidential instrument.

Sentencing remarks and risk language vary across States and Territories—including terminology, the emphasis placed on general versus specific deterrence, and the degree of engagement with rehabilitation evidence—but Direction No 110 applies uniformly notwithstanding those variations.[79]

Accordingly, sentencing risk language should be translated into Direction-

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[78] *Spencer v Commonwealth* (2012) 206 FCR 309.
[79] *Migration Act 1958* (Cth) s 499(2A).

110 terms by extracting the underlying facts and findings relevant to future harm (for example, pattern, triggers, and responsivity) and then reassessing them "as at" the time of decision.[80] The assessment should be updated to give weight to offence-free time in the community, current treatment adherence, and stability factors that post-date sentencing. It should also be contextualised so that where a sentencing court adopted jurisdiction-specific conventions, those are explained as considered but not determinative under paragraph 8.1.2's cumulative assessment. This approach ensures national consistency in federal migration decision-making while respecting the probative value of State-based material.

A delegate or member of the Tribunal may lawfully reach a different, current-day prediction of likelihood than that implicit or explicit at sentencing where: (a) the temporal lens differs (decision "as at" now); (b) the purpose differs (community protection under Direction No 110 vs penal objectives); (c) the evidentiary base has shifted (new expert reports, verified abstinence, offence-free time, supervision compliance); or (d) the sentencing risk comment was contingent or limited (e.g., directed to custodial risk only). Any departure should be reasoned, not formulaic: identify the sentencing passage, acknowledge its weight, then explain the additional/current material that justifies a different qualitative prediction for Direction No 110 purposes.

A further issue that warrants explicit consideration (beyond the scope of this paper) is the constitutional dimension of any proposed redrafting of Direction No 110. Requiring a delegate to make an express evaluative finding on "risk" may raise separation-of-powers concerns by edging into territory traditionally reserved for judicial functions. This risk is heightened because the Department of Home Affairs already operates close to the constitutional boundary when applying the current, deliberately ambiguous form of Direction No 110. While case law demonstrates that evaluative assessments of risk occur in practice, codifying this obligation in a more explicit legislative or quasi-legislative form could invite constitutional challenge and increase litigation exposure for the Department. Any redraft therefore must be carefully framed to avoid expanding executive power in

[80] *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2025] HCA 33 [21].

a way that could be construed as encroaching upon judicial authority.[81]

VII Conclusion

In conclusion, the statutory architecture of sections 501 and 501CA, read with Direction No 110, anchors the decision-maker's task in Primary Consideration 1 to a cumulative, time-stamped evaluation of both the nature of potential harm and the likelihood of further serious conduct. The recent jurisprudence clarifies—not conflicts—that this involves a real, evidence-based assessment of likelihood (as emphasised by Feutrill J in *RNSQ*) without any rigid requirement to express that assessment in quantified or formulaic terms (as explained by Banks-Smith J in *Jattan* and preferred by the Full Court in *RDYQ*).

Proper reasons therefore disclose an active intellectual process linking probative material—including offence-free time in the community and rehabilitation achieved by the time of decision—to a qualitative prediction about future risk, and then transparently weighing that prediction against the gravity of the potential harm in light of paragraph 8.1.2(1)'s sliding-tolerance premise.

Analysis that treats seriousness as an automatic trump, ignore the likelihood limb, or recite risk factors without evaluation miscarry the Direction's cumulative instruction; by the same token, even a low (but real) likelihood may justify an adverse outcome where the foreseen harm is catastrophic, whereas sustained, verifiable rehabilitation may warrant a favourable conclusion where the harm profile is moderated.

To remove recurrent error and sharpen reviewability, the proposed redraft of paragraph 8.1.2(2)(b) would require an express evaluative finding on likelihood (without mandating quantification), specify the probative inputs to be addressed, and insist on the correct temporal lens. That reform would codify best practice already emerging within the Tribunal—where decision-makers often state low, moderate, or high risk, while preserving the necessary flexibility to calibrate risk qualitatively.

On the correct construction, compliance turns not on numbers but on substance: a reasoned, individualised prediction of future conduct, weighed

[81] See generally *Graham v Minister for Immigration and Border Protection Te Puia v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

with the seriousness of potential harm, explained clearly, and reached at the time of decision.