CORRECTING THE MANIFEST ERROR THAT IS THE APPROACH TO MANIFEST ERROR IN SENTENCING APPEALS

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Manifest error is the most common appeal ground for sentencing decisions. It is also the most obscure. The courts have held that the ground does not admit of much argument and that no great assistance can be derived from decisions in other cases. This approach is misguided and has resulted in a high degree of unpredictability. Logically, in order to conclude that a sentence is too harsh or too lenient, it is necessary to have a mathematical reference point. A coherent approach to manifest error appeals requires courts to base their decisions on statistical information regarding sentencing ranges for the offence in question and to make comparisons with specific cases. The approach suggested in this article to manifest error appeals would make decisions in sentencing appeals more predictable and enable appeal courts to provide clearer guidance to lower courts regarding appropriate sentencing outcomes.

I INTRODUCTION

The ground of manifest error is the most common sentencing appeal ground.[1] When the ground is asserted by a defendant, the claim is that the sentence is manifestly excessive.[2] In cases of prosecution appeals, the assertion is that the sentence is manifestly inadequate.[3] The orthodox view is that manifest error is a difficult appeal ground to establish. Through an analysis of a large number of cases, we demonstrate that manifest error is not only a commonly asserted appeal ground but one which has a relatively high degree of success.[4]

Despite the frequency with which manifest error is dealt with by appeal courts, the reasoning process and methodology for dealing with the ground is generally obscure, inconsistent, and lacking in transparency. In dealing with the ground of

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1 See Part III below.

2 Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Lawbook, 10th ed, 2022) 163–4 [270.1000].

3 Ibid.

4 See Part III below.

manifest error, it has been held that the ground 'does not admit of much argument' and that 'no great assistance' can be derived from other cases.[5] The courts have repeatedly noted that manifest error is a conclusion which is arrived at when the sentence is so 'plainly outside the range of sentences available to the judge in the circumstances of the case that appellate intervention is warranted',[6] and hence there is no place for a stepwise, detailed reasoning process.

It follows that the outcome of manifest error appeals is unpredictable. To some extent, this is to be expected. Sentencing is the area of law where 'judicial discretion … plays a considerable role'.[7] The overarching approach that sentencing judges undertake in making sentencing decisions is the 'instinctive synthesis', which prescribes that judges identify all relevant considerations and then reach a precise sentence.[8] The defining aspect of this process is that courts do not explain the weight or significance that is accorded to any sentencing factor or consideration. Instead, a conclusion regarding the appropriate sentence is reached without an explanation of the respective importance of the relevant sentencing factors or how they were balanced and conflated.

The instinctive synthesis has been criticised on the basis that it lacks transparency and leads to unpredictable and inconsistent outcomes.[9] In response to criticisms of this nature, the High Court has stated that consistency in the application of principle as opposed to numerical equivalence is the main objective of sentencing decisions.[10] In order to attain consistency in the application of principle, appeal courts need to provide clear guidance to lower courts through reasons given in sentencing decisions.[11]

Despite this habitual lack of precision in allocating numerical weight to relevant factors associated with sentencing decision-making, the current approach to dealing with the manifest error ground of appeal is unsatisfactory. To merely assert that the answer to appeals based on this ground is a conclusion (and hence that the ground does not admit of much argument) does not negate the fact that it is logically impossible to determine whether a numerical outcome (in the form of sanction) is too large or too small unless one has an appropriate mathematical reference point. Moreover, the nature of the reasoning and approach to some manifest error appeals establishes that it is demonstrably false to state that the

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5 *Quarrell v The Queen* [2011] VSCA 125, [32]–[33] (Mandie JA, Buchanan JA agreeing at [1], Neave JA agreeing at [2]) ('*Quarrell*'). See, eg, *Dinsdale v The Queen* (2000) 202 CLR 321, 325–6 [6] (Gleeson CJ and Hayne J) ('*Dinsdale*'); *R v Demaria* [2008] VSCA 105, [18] (Kellam JA, Vincent JA agreeing at [1], Redlich JA agreeing at [2]) ('*Demaria*').

6 *McPherson v The Queen* [2014] VSCA 59, [36] (Maxwell P, Neave JA agreeing at [57], Redlich JA agreeing at [58]) ('*McPherson*').

7 Bagaric, Alexander and Edney (n 2) 37 [200.100].

8 *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ) ('*Williscroft*'). See also *Markarian v The Queen* (2005) 228 CLR 357, 377–8 [51] (McHugh J) ('*Markarian*').

9 Austin Lovegrove, 'An Empirical Study of Sentencing Disparity among Judges in an Australian Criminal Court' (1984) 33(1) *Applied Psychology* 161; Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualist Sentencing Framework: If You Don't Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 272–3.

10 *Hili v The Queen* (2010) 242 CLR 520, 527 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

11 See Part II below.

ground 'does not admit of much argument'. While courts often deal with this ground in a perfunctory manner, some manifest error appeals are dealt with in a methodical, comprehensive manner which involves reliance on sentencing statistics and comparisons with the numerical sentences in other cases.[12]

In this article, we argue that the current approach to manifest error sentencing appeals is unsatisfactory. We suggest that the courts should adopt a more stepwise and methodological approach to determining such appeals, which involves a careful consideration of sentencing statistics and decisions in comparable cases. Both quantitative and qualitative data should inform the outcome of such appeals. This would make the outcomes of sentencing appeals more predictable and transparent while ensuring greater sentencing consistency overall by providing detailed guidance to lower courts. In this respect, the legal profession is ideally placed to assist the court in the provision of the required information.

In the next part of the article, we provide an overview of sentencing law and practice, including the judicial approach to sentencing decision-making. This is followed in Part III by a discussion of the manner in which courts deal with sentencing error appeals. In Part IV, we evaluate the approach to these appeals and make reform recommendations. These reforms are summarised in the concluding remarks.

II SENTENCING LAW AND DECISION-MAKING METHODOLOGY

By way of backdrop to examining manifest error appeals, we now contextualise the discussion by providing a brief overview of the sentencing system and judicial decision-making process.

In our federal constitutional system, sentencing law is largely determined through judicial application of the extant legislation in each State or Territory jurisdiction and the established general law principles. Despite the existence of legislative diversity in sentencing law across the Australian jurisdictions, there is a broad congruence in most of the stated purposes of sentencing, including retribution, rehabilitation, general deterrence, specific individual deterrence, and community protection through incapacitation.[13]

The ultimate sentence imposed on an offender by a court is derived through a process of judicial identification of all relevant factors, deliberation as to their relative weight and application of the germane statutory and common law principles. These include the statutory maximum penalty, constructing the objective

12 See Part IV below.

13 See *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing) Act* 2005 (ACT) s 7(1); *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 3A ('*CSP Act*'); *Sentencing Act* (NT) 1995 s 5(1); *Penalties and Sentences Act* 1992 (Qld) s 9 ('*PS Act*'); *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6. For an overview, see *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ); Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010) 41–53; Bagaric, Alexander and Edney (n 2) 216–60 [400.100]–[400.7200].

seriousness of the offence, delineating the subjective features of the offender, and any particular factors that aggravate or mitigate the offence and/or penalty to be imposed on the offender. A sentencing decision may take account of any of a wide range of mitigating and aggravating circumstances relevant to an offence and/or an offender,[14] with there being hundreds of such circumstances discernible from sentencing decisions across all Australian jurisdictions.[15] In some cases guideline judgments must be considered,[16] as well as the expectations of penalty indicated by Parliament in legislation. In some cases that can include mandatory custodial sentences[17] or supervision orders.[18]

The approach to making sentencing decisions by judicial officers in Australia is termed 'instinctive synthesis'. This term originated from the decision of the Full Court of the Supreme Court of Victoria in *R v Williscroft*, where the majority stated: 'Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process'.[19] Instinctive synthesis is essentially a methodology used by sentencing judges to reach a decision in a particular case by having regard to each consideration that is determined to be relevant to sentencing for the offence and offender and then giving what is expressed to be due weight to these various considerations to reach an exact form and duration of punishment. During this intuitive process, sentencers combine and balance considerations that impel a more severe penalty with other considerations that favour a lesser penalty by expressly identifying each consideration put into the mix but generally without assigning particular and express weight to any consideration.[20] There is no attempt to set out with any precision how the respective sentencing considerations impacted that ultimate choice of sanction. Thus, there is a significant degree of judicial subjectivity involved in the sentencing calculus.

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14 In New South Wales ('NSW') there are more than 30 statutory aggravating and mitigating circumstances, and in Queensland there are 18 with additional circumstances required to be considered for specific offences: see *CSP Act* (n 13) ss 21A–24; *PS Act* (n 13) s 9.

15 Joanna Shapland identified 229 relevant sentencing factors while Roger Douglas identified 292: Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55; Roger Douglas, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (La Trobe University, 1980) 62. For an overview of the operation of mitigating and aggravating factors, see Mackenzie, Stobbs and O'Leary (n 13) ch 4; John Anderson et al, *Criminal Law Perspectives: From Principles to Practice* (Cambridge University Press, 2021) 113–15.

16 See, eg, *CSP Act* (n 13) s 42A.

17 Some offences provide for 'mandatory' life sentences. In NSW, for example, section 19B of the *Crimes Act 1900* (NSW) directs a court to impose a life sentence for murdering a police officer. The 'mandatory' direction is subject to the discretionary sentencing powers of Chapter III courts. The result is that a 'mandatory sentence' in legislation is a guide in sentencing, not a directive. See also the mandatory life sentence provisions in section 61 of the *CSP Act* (n 13).

18 Domestic violence offences often involve a requirement for full time custody or supervision orders: see *CSP Act* (n 13) s 4A.

19 *Williscroft* (n 8) 300 (Adam and Crockett JJ). See also Mackenzie, Stobbs and O'Leary (n 13) 28–30; Bagaric, Alexander and Edney (n 2) 39–57 [200.640]–[200.900]; Anderson et al (n 15) 107–10.

20 The only two exceptions are pleading guilty and cooperating with authorities; see eg, *CSP Act* (n 13) ss 22, 23; Mackenzie, Stobbs and O'Leary (n 12) 89–94; Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Media, 5th ed, 2020) ch 4.

The present orthodoxy is that there is no one correct sentence in a case[21] and that the 'instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ'.[22] According to this methodology, courts can impose a specific punishment that is within an 'available range' of penalties. There is no clear statement of the spectrum of penalties covered by this 'available range' in relation to individual offences, however, if the sentence is determined to fall outside this elusive tariff span then, on appeal, the sentence can be quashed as found to be either 'manifestly excessive'[23] or 'manifestly inadequate'.[24]

The 'two-tier approach' has been recognised as the alternate approach to an instinctive synthesis methodology. The two tiers are said to be, first, where a judicial officer determines a proportionate sentence in the sense of being commensurate with the objective seriousness of the offence and, second, he or she makes specific allowances to increase or decrease that sentence, having express regard to any relevant aggravating and mitigating circumstances.[25]

The two-tier approach was firmly rejected by the High Court in *Markarian v The Queen*, where the majority observed:

> Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison.[26]

The High Court more recently considered these alternate and competing approaches to sentencing in *Barbaro v The Queen*, where the plurality decisively confirmed the correct approach as instinctive synthesis, stating:

> Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing

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21 *Markarian* (n 8) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ), citing *Pearce v The Queen* (1998) 194 CLR 610, 624 [46] (McHugh, Hayne and Callinan JJ).

22 *Hudson v The Queen* (2010) 30 VR 610, 616 [27] ('*Hudson*') (Ashley, Redlich and Harper JJA).

23 In *Melham v The Queen* [2011] NSWCCA 121 [85] (Garling J, Macfarlan JA agreeing at [1], Johnson J agreeing at [2]), the Court stated '[t]he relevant test for the applicant to succeed on this ground [manifest excess] requires the applicant to demonstrate that the sentence was unreasonable or plainly unjust': *Dinsdale* (n 5) [6] (Gleeson CJ and Hayne J).

24 For discussion of this concept, see *R v Creighton* [2011] ACTCA 13 [67]–[68] (Penfold J); *R v Hill* [2010] SASCFC 79 [22]–[23] (Vanstone J, Duggan J agreeing at [2], David J agreeing at [26]); *R v Holland* (2011) 205 A Crim R 429, 441–2 [60] (Schmidt J); *R v Sukkar* [2011] NSWCCA 140; *R v McHarg* [2011] NSWCCA 115, [122]–[124] (Johnson J); *DPP (Vic) v Clunie* [2016] VSCA 216 [30]–[31] (Maxwell ACJ, Osborn JA and Santamaria J) ('*Clunie*'); *R v UG* (2020) 281 A Crim R 291 ('*UG*'); *R v Newby* (2022) 367 FLR 122, 146–7 [72]–[76] (Elkaim, Mossop and Bromwich JJ); *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377, 403–6 [117]–[130] (Bell CJ, Walton J agreeing at 406 [132], Davies J agreeing at 406 [133]) ('*R v Jacobs Group*').

25 The contrasts are also usefully set out by McHugh J in *Markarian* (n 8) as follows at 377–8 [51]:

> By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the 'objective circumstances' of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

26 *Markarian* (n 8) 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

> is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said in *Wong v The Queen*, '[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform'.[27]

Overall, it is apparent that the sentencing process is reputed to be, above all else, an attempt to attain 'individualised justice' in the particular case. The broad rationale for the instinctive synthesis methodology was considered by the High Court in *Wong v The Queen* where most judges conceptualised the process of sentencing as an exceptionally difficult task with a high degree of 'complexity'.[28] The inherently multi-faceted nature of sentencing is often put forward as detracting from the ability of sentencers to make 'exact' decisions.[29] Accordingly, the recurring judicial voice is a reasonably strong one emphasising that differential outcomes can be justified if they are seen as coming within what is determined to be an acceptable range of punishment forms and durations with no pretension to painstaking rigour in nominating such a range.

III THE APPROACH TO MANIFEST ERROR APPEALS

A The Methodology and Approach to Determining Manifest Error Appeals

In order to succeed on appellate review of a sentence, it is necessary to establish an error. There are two broad ways in which this can be achieved. The first is by establishing a specific error. This can be accomplished by demonstrating that there has been a mistake in some material way in relation to the sentencing process: such as a denial of procedural fairness, a failure to take into account a relevant mitigating or aggravating factor, taking an irrelevant factor into account, or a misunderstanding of the statutory maximum penalties. In *Dinsdale v The Queen* ('*Dinsdale*'), Kirby J said in relation to the role of specific error in a sentence appeal:

> The necessity to show error in such a case is fully accepted by courts deciding appeals against sentence … Because the imposition of a sentence involves the exercise of judgment and evaluation upon which minds can differ, it bears close similarities to the making of a discretionary decision. Like such a decision, if properly imposed, a sentence will not be disturbed on appeal merely because the appellate court would have reached a different result had the responsibility of sentencing belonged to it. As in the case of appellate review of a discretionary decision, a brake is imposed upon undue appellate disturbance of primary decisions (and unwarranted appeals seeking that relief) by the necessity to identify an error that justifies and authorises

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27 (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original) (citations omitted).

28 (2001) 207 CLR 584, 612 [77] (Gaudron, Gummow and Hayne JJ) ('*Wong*').

29 See the dicta of McHugh J who notes the difficulties of any 'attempts to give the process of sentencing a degree of exactness which the subject matter can rarely bear': *AB v The Queen* (1999) 198 CLR 111, 120 [13].

> appellate intervention. Such an error may involve the adoption by the primary judge of an incorrect principle, giving weight to some extraneous or irrelevant matter, failing to give weight to some material considerations, or a mistake as to the facts.[30]

Where it is necessary to establish a specific error, to succeed on appeal it is also necessary to demonstrate that absent the error a different sentence would have been imposed. This is because there would be no reason to interfere with the first instance decision unless the court formed the view that the error resulted in a sentence that should be different, even if only minimally so. In *Baxter v The Queen*, an appeal involving misstatement of the statutory maxima, Kirby J concluded:

> I accept that the applicant does not have to establish the sentence was manifestly excessive. To be a material error, it is enough that such error may, as a matter of inference, have infected the reasoning of the sentencing judge such that, absent error, some other and lesser sentence may have been imposed.[31]

The other broad type of sentencing appeal is that the sentence was manifestly erroneous. Appeals based on manifest error come in two forms. The first ground is manifest excess, which is asserted by defendants.[32] The other is manifest inadequacy, which is asserted by the prosecution.[33] A key difference between the manifestly erroneous ground of appeal and other grounds of appeal is that in order to succeed on the basis of manifest error it is not necessary to identify the precise error in the sentence or the sentencing reasons which was made by the sentencing court. If the sentence is viewed as being manifestly too harsh or too lenient it is assumed that an error was inherent in the sentence. Thus, in *Dinsdale*, Kirby J stated:

> As on appeal from discretionary decisions, it will sometimes not be possible to identify, with exactness, an error of the foregoing kind; yet the result that is challenged may be so manifestly unreasonable or plainly wrong that the appellate court will be able to infer that, in some unidentified way, there has been a failure to exercise the power properly. In appellate review of sentencing, it will commonly be the case that the appellate court's authority to intervene will derive from a conclusion that the resulting order is so disproportionate to the matter to which it relates as to afford the foundation for concluding that, in some way, the exercise of the powers of the primary judge has miscarried.[34]

While in order to succeed in an application based on manifest error it is possible in some cases to identify the specific error which resulted in the mistake, some courts have indicated that this identification is unnecessary and may in fact even be undesirable. In this regard, Priest JA stated in the Victorian Court of Appeal:

> Much of the argument on the appeal seemed directed to assertions of specific error. That may be because, as has become customary, the ground of appeal complaining of manifest inadequacy had six subjoined 'particulars'. In my opinion, however, supposed particulars of manifest inadequacy are, at best, a distraction; and at worst, are calculated to subvert the essential inquiry that must be made when it is asserted that a sentence is manifestly inadequate. Indeed, undue attention to 'particulars'

30 *Dinsdale* (n 5) 339–40 [58] (citations omitted).

31 (2007) 173 A Crim R 284, 294–5 [60] (Spigelman CJ agreeing at 285 [1], Latham J agreeing at 298 [82]). See also *Hordern v The Queen* (2019) 278 A Crim R 353.

32 Bagaric, Alexander and Edney (n 2) 163–70 [270.1000]–[270.1040].

33 Ibid 163–4 [270.1000], 170–5 [270.1060].

34 *Dinsdale* (n 5) 340 [59] (citations omitted).

> invites a piecemeal consideration of the relevant features of a case, inconsistent with an approach which intuitively synthesises all relevant factors.[35]

The general approach to dealing with manifest error sentencing appeals is summarised by the New South Wales ('NSW') Court of Criminal Appeal in *Barrett v The Queen* as follows:

> The principles to be applied in determining whether a sentence is manifestly excessive were usefully summarised by this Court in *Hughes v R* [2018] NSWCCA 2 at [86]:
>
> (1) appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases;
>
> (2) intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error;
>
> (3) it is not to the point that this Court might have exercised the sentencing discretion differently;
>
> (4) there is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle; and
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> (5) it is for the applicant to establish that the sentence was unreasonable or plainly unjust.[36]

The term 'manifest' plays a cardinal role in such appeals. The ground will not be satisfied simply if the appeal court would have imposed a different sentence. The sentence must be outside the 'range' of what is acceptable. In *Dinsdale*, Gleeson CJ and Hayne J noted that it is not easy to provide elaboration as to the meaning of this term:

> Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion. A Court of Criminal Appeal is not obliged to employ any particular verbal formula so long as the substance of its conclusions and its reasons is made plain. The degree of elaboration that is appropriate or possible will vary from case to case.[37]

In *Director of Public Prosecutions (Acting) (Tas) v Pearce*, Pearce J emphasised the opaque notion of manifest error and the difficulty of establishing the ground:

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35 *DPP (Vic) v Ristevski* [2019] VSCA 287, [62] (Ferguson CJ, Whelan JA agreeing at [1]). See also, *UG* (n 24).

36 [2020] NSWCCA 11, [109] ('*Barrett*'). See also *Obeid v The Queen* (2017) 96 NSWLR 155. 241–2 [443] (RA Hulme J, Bathurst CJ agreeing at 216 [289], Leeming JA agreeing at 216 [291], Hamill J agreeing at 245–6 [473], N Adams J agreeing at 246 [475]).

37 *Dinsdale* (n 5) 325–6 [6].

> [On appeal, the] court sits to correct material error: *Dinsdale v The Queen* … (2000) 202 CLR 321 per Kirby J at [57]–[60]. Where no specific error is alleged, this Court must be persuaded of error of the second type referred to in *House v The King* … (1936) 55 CLR 499 at 505, that is, that the sentence imposed by the sentencing judge is 'unreasonable or plainly unjust'. It is not to the point that the sentence may be regarded by some as too lenient or too harsh. It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v The Queen* … (1992) 1 Tas R 234 at 242. … Sentencing judges should be 'accorded a wide measure of latitude': *Postiglione v The Queen* … (1997) 189 CLR 295 per Kirby J at 336. Excess or inadequacy is either apparent or it is not: *Dinsdale v The Queen* (above) at [6].[38]

Further in *McPherson v The Queen*, the court stated that manifest error is 'a stringent requirement, difficult to satisfy. It reflects the oft-repeated policy that sentencing is for judges and magistrates at first instance. Sentencing is not the task of appellate courts, except where clear error is shown'.[39]

A distinctly useful summary of the approach to manifest error appeals which emphasises the broadness of the sentencing discretion and latitude given to sentencing courts is set out by the NSW Court of Criminal Appeal in their comparatively recent decision in *Clarke v The Queen*:

> The contentions by the applicant compel attention to the principles applicable to the determination of a manifest excess ground, which principles were recently set out in this Court's judgment in *Norouzi v R* [2020] NSWCCA 237 at [46]–[49].
>
> By contending the exercise of the sentencing discretion below resulted in a sentence which was manifestly excessive, the applicant must be taken as asserting the sentencing process was attended by the last mentioned error in *House v The King* (1936) 55 CLR 499 at 505, such that a sentence is manifestly excessive where the applicant shows that the sentence is "unreasonable or plainly unjust": *Markarian v The Queen* … at [25] (per Gleeson CJ, Gummow, Hayne and Callinan JJ); *Obeid v R* … at [443] (per R A Hulme J, with whom Bathurst CJ, Leeming JA and Hamill J agreed). This has to be established in a context where there is no single correct sentence and where judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle: *Markarian* at [27]; *Vuni v R* … at [33] (per Hoeben J (as his Honour then was), with Tobias JA and James J agreeing); *Vale v R* … at [37] (per Hoeben CJ at CL, with whom Rothman and R A Hulme JJ agreed). It is not to the point that the Court might have exercised the sentencing discretion differently: *Obeid* at [443].
>
> Intervention is not warranted simply because the sentence is "markedly different" from other sentences that had been imposed in other cases: *Wong v The Queen* … at [58]; *Obeid* at [443]. Rather, there must be some misapplication of principle, even though when and how is not apparent from the reasons given in the impugned judgment: *Hili v The Queen; Jones v The Queen* … at [58] (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wong* at [58].[40]

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38 [2015] TASCCA 1, [8] (Blow CJ agreeing at [1], Porter J agreeing at [2]). See also *Cordwell v Tasmania* [2017] TASCCA 14, [7].

39 [2014] VSCA 59, [37] (Maxwell P), quoting *Clarkson v The Queen* (2011) 32 VR 361, [89]. See also *Clunie* (n 24).

40 [2021] NSWCCA 236, [77]–[79] (Walton J, Meagher JA agreeing at [8], Harrison J agreeing at [112]) ('*Clarke*'). See also *Bell v The Queen* [2019] NSWCCA 251, [57] ('*Bell*') (RA Hulme J, Bell P agreeing at [1], Simpson AJA agreeing at [2]); *Wilson v Western Australia* [2010] WASCA 82, [2] (McLure P and Owen JA); *McDougall v Western Australia* [2009] WASCA 232 ('*McDougall*'); *R v Williams* (2014) 254 A Crim R 441; *Kahler v The Queen (Cth)* [2021] NSWCCA 40; *Ewan v The Queen* [2019] NSWCCA 17 ('*Ewan*').

Thus, whether a sentence is manifestly excessive or not has consistently eluded precise definition. As discussed, the courts have constantly justified this position on the basis that the outcome of such appeals is essentially a conclusion.[41] The paradox is that the requirement for the error to be established is recognition of a penalty manifestly outside of the range of available penalties, raising the question of why that error was not self-evident at the point of sentence. At a policy level, this fact provides the justification for judicial correction of the error. At a theoretical level, this aspect of appeal opens a window into the nexus between sentencing and the deep links between notions and theories of justice. The ultimate issue in manifest error appeals is the discord between the sentence imposed and the justice of the case. Justice, of course, is a complex notion in its own right, but in this context the deep theoretical underlay is concerned strongly with justice as proportional punishment for wrongs committed, based on what are known as retributive forms of punishment. This is an important observation, for the trigger for recognition of justiciable error is linked to the comparative reasoning linked to a nebulous theoretical problem of what is the justice of the case.[42]

On rare occasions, however, the courts have provided some guidance regarding the considerations that may be relevant to determining a manifest error ground. In *Phan v Western Australia*, the Court stated:

> Whether a sentence is manifestly excessive (or inadequate) requires a consideration of the maximum penalty for the offence, the place which the criminal conduct occupies in the scale of seriousness of offences of the type committed by the appellant, the standards of sentencing customarily imposed for the offence and the personal circumstances of the offender: *Chan v The Queen* (1989) 38 A Crim R 337, 342.[43]

While the same approach applies to identifying error in defence and prosecution appeals, if manifest inadequacy is found the appeal will often not succeed because there is an additional obstacle faced regarding appeals by the Crown.[44] Even if the

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41 *DPP (Vic) v Terrick* (2009) 24 VR 457 ('*Terrick*'). As explained by Gleeson CJ and Hayne J in *Dinsdale* (n 5) at 325–6 [6]. Similar pronouncements have been made by the Victorian Court of Appeal. In relation to manifest excess, it was stated by Mandie JA in *Quarrell* (n 5) that 'the question of manifest excess does not admit of much argument' (at [32]) and further that 'no great assistance' (at [33]) can be derived from other cases. Similarly, in *Demaria* (n 5) at [18], the Court stated: 'Whether or not a sentence is manifestly excessive is often said as not admitting of much argument. The question raised is whether the sentence is outside the range of sentences available to his Honour in the exercise of sound discretionary [judgment]. Once the relevant circumstances are ascertained, the sentence appears plainly excessive or it does not.'

42 There is a significant body of literature on this topic. For a representative sample, see generally HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008); Joel Feinberg, *The Moral Limits of the Criminal Law: Harm To Others* (Oxford University Press, 1984); John Rawls, *A Theory of Justice* (Belknap Press, 1971); Randolph Clarke, 'Moral Responsibility, Guilt, and Retributivism' (2016) 20(1) *Journal of Ethics* 121 <https://doi.org/10.1007/s10892-016-9228-7>; Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976); Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985); Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993).

43 [2014] WASCA 144, [19] (Mazza JA, Martin CJ agreeing at [1], Buss JA agreeing at [2]).

44 *R v Chea* [2008] NSWCCA 78. An example of a case where an appeal court declined to interfere with a penalty to increase the sentence even where it acknowledged that the sentence is manifestly inadequate is *DPP (Vic) v Gregory* (2011) 34 VR 1. In this case, the appeal court did not increase a manifestly inadequate sentence for a number of reasons including: fault on behalf of the Crown (before the

prosecution does establish manifest inadequacy or another form of error in the sentence, the appeal court still has a residual discretion to reject the appeal.[45] In *R v Nicholas*, the principles applying to a Crown sentence appeal alleging manifest inadequacy were summarised by Elkaim J in the ACT Court of Appeal in the following way:

> In the case of Crown appeals alleging manifest inadequacy of a sentence, the correct approach was recently summarised in *R v Rappel* [2019] ACTCA 11 at [10], where the Court stated:
>
> > As this Court said in *R v Lee* [2017] ACTCA 30 at [53], a Crown appeal against sentence is a 'unique species of appeal' ... Such appeals 'constitute an anomaly in the criminal justice system and so should be instituted sparingly': *R v TW* [2011] ACTCA 25; (2011) 6 ACTLR 18 at [3]. Appropriate occasions that might arise for the bringing of a Crown appeal, include, as stated in *R v Clarke* (1996) 2 VR 520 at 522:
> >
> > (a) to correct a sentence that reveals such manifest inadequacy or inconsistency in sentencing standards as to constitute an error in principle;
> >
> > (b) to enable the Court to establish and maintain adequate standards of punishment;
> >
> > (c) to ensure uniformity in sentencing, so far as the subject matter permits.[46]

In *R v Duffy*, it was stated that:

> It will be very difficult for the Crown to succeed on an appeal where it relies solely on 'manifest inadequacy' and seeks to infer an error of principle from the length and/or nature of the sentence. Whereas offender appeals are concerned with the correction of error in particular cases, prosecution appeals are brought to establish matters of principle. In prosecution appeals, the focus must remain firmly on the question of whether there has been an error of principle.[47]

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sentencing judge, the representative of the Crown initially agreed with the sentence), delay in charging the offender and that the offender's present liberty would be terminated, and the need for rehabilitation. Another example is the decision of *DPP (Vic) v Borg* (2016) 258 A Crim R 172, where despite finding that the sentence of a five-year community correction order was 'manifestly inadequate' the court exercised its residual discretion to not impose a term of imprisonment for serious driving offences which resulted in multiple deaths and serious injuries. What appeared decisive was not only the fact that the respondent was very young and his offending attracted the descriptor of 'low moral culpability', but that the prosecution had refused an early offer to resolve the matter. The delay in resolution of the matter meant that the respondent was no longer eligible for a youth justice centre order and would have to be sent to an adult prison. As to the general principles in determining prosecution appeals against sentence, see also *R v Fati* (2021) 291 A Crim R 80; *R v Ibrahim* [2021] NSWCCA 296; *R v Jacobs Group* (n 24).

45 See, eg, *R v Wasson* [2014] NSWCCA 95. In *Western Australia v Charles* [2016] WASCA 108 at [53] it was noted that '[t]he State must negative any reason why the residual discretion should not be exercised': see also *CMB v A-G (NSW)* (2015) 256 CLR 346, 358–9 (French CJ and Gageler J), 370 (Kiefel, Bell and Keane JJ); *Western Australia v Stoeski* [2016] WASCA 16 [163] (Buss JA).

46 [2019] ACTCA 36, [68]. The reluctance to grant a prosecution appeal is especially strong where the offender has not been sentenced to imprisonment. In *R v Harkin* (2011) 109 SASR 334, Gray and Sulan JJ stated at 340 [24] (citations omitted):

> In a case where an offender has been given a non-custodial or suspended sentence, the appellate court will be particularly reluctant to interfere and impose a sentence of immediate imprisonment. In *Hicks*, King CJ observed: … When a person … has been told that he will not have to go to prison, a great load is lifted from his mind. The consequences of reversing that intimation could be devastating.

For an example of where an accused was sentenced to imprisonment following a prosecution appeal after initially avoiding a prison term at first instance, see *R v Saleh* (2015) 257 A Crim R 212.

47 (2014) 297 FLR 359, 367–8 [60] (Murrell CJ, Refshauge and Ross JJ).

While Crown appeals largely rely on the same set of principles, in practice they enjoy a relatively high rate of success despite the caution on their use evident in the cases.

B Summary of Manifest Error Approach

There are four key principles associated with manifest error appeals.

1 It is Not Necessary to Precisely Identify a Mistake

The first is that in order to establish the ground, it is necessary that a mistake was made in formulating the sentence. However, it is not necessary to precisely identify the mistake. Thus, it has been noted that: 'there must be some misapplication of principle, even though when and how is not apparent from the reasons given in the impugned judgment'.[48] A mistake is inferred if the sentence is outside the range of available sentences: 'If the conclusion is that the sentence was outside the available range, then it may be inferred that too much or too little weight was given to one or other consideration'.[49] The fact a mistake can be made and not identified stems from the underlying 'instinctive synthesis' sentencing methodology, which 'involves the exercise of judgment and evaluation upon which minds can differ, … [and] bears close similarities to the making of a discretionary decision'.[50] Accordingly, there is no single correct sentence and judges at 'first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle'.[51] In fact, judges have a 'wide measure of latitude'[52] in formulating sentence.

2 There is Little Elaboration about When a Sentence is Such for a Conclusion to be Reached That There Was a Mistake

The second relates to the content of the principle. The ground of manifest error is the contention that a sentence is too harsh or too lenient. The courts have not sought to define when a sentence is too severe or too soft apart from noting that the threshold is reached when the sentence is 'manifestly unreasonable or plainly wrong … [such] that the resulting order is so disproportionate to the matter to which it relates as to afford the foundation for concluding that, in some way, the exercise of the powers of the primary judge has miscarried'.[53] There has been little attempt to inject further content into these terms but it is apparent that they can be only satisfied when there is a big discrepancy between the sentence that was imposed and the appropriate sentence adjudged by the appellate court. This is

48 *Hili* (n 10) 538–9 [59] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Wong v The Queen* (2001) 207 CLR 584, 605–6 [58]; *Bell* (n 40) [57] (RA Hulme J, Bell P agreeing at [1], Simpson AJA agreeing at [2]).

49 *Terrick* (n 41) 460 [5] (Maxwell P, Redlich JA and Robson AJA) (emphasis in original).

50 *Dinsdale* (n 5) 339 [58] (Kirby J).

51 *Barrett* (n 36) [109] (Barrett CJ), quoting *Hughes v The Queen* [2018] NSWCCA 2, [86] (Payne JA, RA Hulme and Garling JJ).

52 *Postiglione v The Queen* (1997) 189 CLR 295, 336 (Kirby J).

53 *Dinsdale* (n 5) 340 [59] (Kirby J).

because it has been noted that for the manifest error ground to be established it 'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'.[54]

3 It is Pointless to Analyse Too Deeply

Thus, it has generally been accepted that the there is little scope for detailed analyses or consideration regarding whether a sentence involves manifest error: 'whether or not a sentence is manifestly excessive is often said as not admitting of much argument'.[55] In a similar vein, it has been noted: '[o]nce the relevant circumstances are ascertained, the sentence appears plainly excessive or it does not'[56] and the ground 'frequently does not admit of amplification';[57] it is a conclusion.[58]

4 A Glimpse of Content and Principle

However, in rare situations, the courts have provided some insight into concrete considerations that inform this ground. Manifest error will be established when the sentence is outside the range of permissible sentences. The range means 'the limits within which reasonable minds can differ on the appropriate sentence for a particular case. It is an error of law to impose a sentence which is outside the range applicable to the particular case'.[59] In *R v MacNeil-Brown*, it was noted by the Victorian Court of Appeal that a submission on sentencing range 'must be based on a clearly-articulated view of the gravity of the offence, the relevant sentencing principles and practices, and relevant aggravating or mitigating factors'.[60] Other factors that are relevant in establishing the range are the 'maximum penalty for the offence, the place which the criminal conduct occupies in the scale of seriousness of offences of the type committed by the appellant, the standards of sentencing customarily imposed for the offence and the personal circumstances of the offender'.[61]

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54 *Wong* (n 28) [58] (Gaudron, Gummow and Hayne JJ); *Obeid* (n 36) [443] (RA Hulme J, Bathurst CJ agreeing at 216 [289], Leeming JA agreeing at 216 [291], Hamill J agreeing at 245–6 [473], N Adams J agreeing at 246 [475]).

55 *Demaria* (n 5) [18] (Kellam JA, Vincent JA agreeing at [1], Redlich JA agreeing at [2]).

56 Ibid.

57 *Dinsdale* (n 5) 325 [6] (Gleeson CJ and Hayne J).

58 Indeed, there are countless examples of manifest error appeals dealt with in a perfunctory manner. Recent examples where the appeals were dismissed include: *Bayssari v The Queen* [2021] NSWCCA 235; *Jeffery v The Queen* [2021] NSWCCA 221; *Hall v The Queen* (2021) 291 A Crim R 18; *Weaver v The Queen* [2021] NSWCCA 215; *Long v The Queen* [2021] NSWCCA 212; *Murtagh v Tasmania* [2021] TASCCA 7; *Lord v The Queen* [2021] SASCA 122; *Modra v The Queen* [2021] SASCA 88; *VRE v Western Australia* [2021] WASCA 185; *R v Watson* [2021] QCA 225; *R v Marques Malagueta* [2021] QCA 195; *R v Cook* (2021) 9 QR 101; *R v Barclay* [2021] QCA 193; *R v Gibbs* [2021] QCA 191; *R v JAD* [2021] QCA 184; *Duale v The Queen* [2022] VSCA 80. Recent examples where appeals were allowed include: *Pham v The Queen* [2021] NSWCCA 234; *Cuong v The Queen* [2021] SASCA 89; *Measures v The Queen* [2021] SASCA 82; *R v Jacques* [2021] SASCA 94; *DPP (Tas) v Kendall* [2021] TASCCA 10; *R v Amos* [2021] SASCA 126.

59 *R v MacNeil-Brown* (2008) 20 VR 677, 681 [10] (Maxwell P, Vincent and Redlich JJA).

60 Ibid [12] (Maxwell P, Vincent and Redlich JJA, Buchanan JA agreeing at [122] with additional observations, Kellam JA agreeing at 712 [137], 716 [148] as to the outcome for different reasons).

61 *Phan v Western Australia* [2014] WASCA 144, [19] (Mazza JA, Martin CJ agreeing at [1], Buss JA agreeing at [2]); *Western Australia v Gibbs* (2009) 192 A Crim R 399, 413 [56] (Steytler P); *Chan v The*

C The Frequency of Manifest Error Appeals and Success Rates

Some of the most comprehensive data relating to manifest error appeals is contained in a report by the Victorian Sentencing Advisory Council published in March 2012,[62] which analysed the outcomes of sentencing appeals determined by the Victorian Court of Appeal for the years 2008 and 2010. Both offender and Crown appeals were analysed. The report identified the main grounds of appeal in the respective years and success rate of each of the grounds.

Considering this data in terms of any contribution to understanding the nature and extent of manifest error appeals and the need for more transparency in the judicial determination of such sentencing appeals, manifest excess was the most common ground raised in the 114 sentence appeals by offenders determined in 2008.[63] When this ground of appeal was raised in over 71% of the cases it succeeded or was considered favourably 35% of the time.[64] In total, 19 different grounds were argued in that year on two or more occasions, and of the grounds that were raised 10 or more times (ie, where the data is statistically informative) only three grounds succeeded more frequently than manifest excess: weight to guilty plea (46%); totality (43%) and weight to prospects of rehabilitation (38%).[65] There were 33 Crown appeals against sentence with manifest inadequacy argued in 97% of those cases.[66] This was by far the most utilised ground of appeal and the one with the highest success rate as the basis for allowing the appeal in 19 out of 33 cases or 58% of the time.[67] The only grounds with a higher success rate were weight to prospects of rehabilitation (86%) and weight to youth (75%), but these grounds were rarely argued with only seven (21%) and four (12%) cases respectively identified.[68]

In 2010, 153 offender sentence appeals were determined by the Court of Appeal.[69] Manifest excess was again the most common ground raised by an appellant being argued in 126 cases, and it succeeded or was considered favourably 34% of the time.[70] In total for 2010, 23 different grounds were again argued on two or more occasions, and of the grounds that were raised 10 or more times only one ground succeeded or was considered favourably more frequently than manifest

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Queen (1989) 38 A Crim R 337, 342 (Malcolm CJ); *McDougall* (n 40) [12]–[13] (McLure P, Owen JA agreeing at [18], Wheeler JA agreeing at [19]).

62 Sentencing Advisory Council (Vic), *Sentence Appeals in Victoria: Statistical Research Report* (Report, 8 March 2012) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Appeals_in_Victoria_Statistical_Research_Report.pdf>.

63 Ibid 90–2.

64 Ibid 139.

65 Ibid 92–3, 138–9. Percentages have been rounded to the nearest whole number.

66 Ibid 92–3.

67 Ibid 92–3, 140–1. Percentages have been rounded to the nearest whole number.

68 Ibid.

69 Ibid 94. As noted above, the relative success rates during this period were approximately 60% and 40%, respectively. Percentages have been rounded to the nearest whole number.

70 Ibid 94, 142 (Appendix 2, Table C). Cases where the ground was successful as a separate ground of appeal, or which were considered favourably, were combined to calculate this percentage. Percentages have been rounded to the nearest whole number.

excess: approach to parity (39%).[71] There were 27 Crown sentence appeals in 2010 and manifest inadequacy was argued in 25 of these cases. This ground was successful or considered favourably in 44% of these instances.[72] Again, this was by far the most utilised ground of appeal and the one with the highest success rate.[73] During the two years of this statistical research study, approximately 60% of offender sentence appeals and approximately 50% of Crown appeals against sentence succeeded[74] – although in many cases there was more than one ground of appeal and hence it is not possible from the data provided to determine the precise success rate of any one ground.

Notwithstanding, the figures extrapolated from this data must be used with a considerable degree of reservation as limitations are apparent. First, the sample size is limited to 267 offender appeals and 61 Crown appeals for both years combined.[75] Second, the study was quantitative, not qualitative, and hence it is not possible to ascertain the strength of the appeal grounds in any particular case. Third, the surveyed cases are from the one jurisdiction and more than a decade old. Despite this, non-comprehensive data is preferable to no data and the available data in Victoria supports the view that manifest excess and manifest inadequacy are grounds which have a high rate of success in sentence appeals.[76] In that time there may be any number of variables that have affected sentencing and appeal outcomes. In particular, there is little doubt that significant changes took place in Victorian criminal justice as a result of the COVID-19 pandemic, which included substantial changes in sentencing practices.[77] Whether this has resulted in changes in manifest error appeals remains to be seen.

Turning to the NSW jurisdiction, data is available which also supports this contention of high resort to manifest error as a sentencing ground of appeal together with a moderately high rate of success. The aggregate data for the years 2000–18 shows that approximately 40% of offender appeals against severity of sentence were successful and approximately 57% of Crown appeals against inadequacy of sentence were successful in the NSW Court of Criminal Appeal.[78] The available

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71 Ibid 142 (Appendix 2, Table C). Cases where the two grounds were successful as a separate ground of appeal or which were considered favourably, were combined to calculate these percentages. Percentages have been rounded to the nearest whole number.

72 Ibid 96–7, 103, 105, 144–5. Percentages have been rounded to the nearest whole number.

73 More generally, it has previously been noted that Crown sentence appeals enjoy a high success rate: see Richard Edney, 'The Rise and Rise of Crown Appeals in Victoria' (2004) 28(6) *Criminal Law Journal* 351.

74 These figures are not specific because the success rates are reported for financial years: see Sentencing Advisory Council (Vic) (n 62) 66–9. Percentages have been rounded to the nearest whole number.

75 Ibid 96.

76 Ibid 107.

77 Brendon Murphy, John Anderson and Mirko Bagaric, 'The Curious Role of COVID-19 in Sentencing: The Relevance and Mitigating Weight of Ill Health and Harsh Prison Conditions' (2022) 47(3) *Monash University Law Review* 25.

78 Judicial Commission of New South Wales, *Sentencing Bench Book* (Web Page, 2 May 2022) [70-010] <https://web.archive.org/web/20220312175856/https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/appeals.html>. See also New South Wales Law Reform Commission, *Criminal Appeals* (Report No 140, March 2014) where aggregate data is provided for the years 2002–12 to show success rates for defendant appeals against sentence ranged from 34.3% to 49.5% (at 142) and success rates for Crown appeals against sentence ranged from 37.5% to 71% (at 147–8).

data does not provide a breakdown of the grounds of appeal; however, from a sample consideration of sentence appeals throughout this lengthy time period, it is apparent anecdotally that manifest excess is regularly raised as a ground in offender appeals and manifest inadequacy is the primary ground of appeal in the large majority of Crown appeals against sentence. To fortify this conclusion, the most recent 2021 data from the NSW Court of Criminal Appeal shows that 327 judgments were delivered,[79] including 250 sentencing appeals of which 160 (64%) cases raised manifest error as a ground of appeal. In 20 judgments the ground was not adjudicated because the case was decided on another ground. Of the remaining 140 cases in which the ground was raised and finalised, it was successful in over 32% of those cases.

The difficulty with making firm conclusions is the paucity of consistent information across jurisdictions. Australia's federal structure necessarily fragments the sources. Nevertheless, information that is available tends to confirm that successful manifest error appeals are more common than the jurisprudence suggests. Against this backdrop of the significance of the manifest error ground in sentencing appeals and its moderately high success rate, we now evaluate the judicial approach to manifest error sentencing appeals.

IV EVALUATION AND REFORM PROPOSALS

A The Need for Reform

Manifest error is a well-established and frequently utilised appeal ground. Despite this, there are several problems in the manner in which the ground has been described by the courts and the general practical approach to determining the success of the ground.

The first two problems can be identified briefly. As noted above,[80] the courts have regularly stated that this ground is difficult to establish. This is not correct. The available empirical data indicates that it enjoys a high level of success compared to other grounds of appeal. Further, the courts have also stated that this ground often does not admit of much argument. This too is incorrect. In fact, in some instances courts do undertake a comprehensive analysis of the sentence under review.[81] These two fallacies do not necessarily call for revision or reform of this ground of appeal, but they are indicative of a gulf between the manner in which the ground is described and the way in which it actually operates in practice. Moreover, there is a deeper fundamental problem in the manner in which the ground is approached.

The argument that a sentence is manifestly excessive or inadequate is logically the view that the sentence is too low or too high. It is generally a numerical

79 See 'Recent Supreme Court of New South Wales: Court of Criminal Appeal Decisions', *AustLII* (Web Page, 2 May 2022) <http://classic.austlii.edu.au/au/cases/nsw/NSWCCA/recent.html>.

80 See above Part III(A).

81 See, eg, *Vincec v The Queen* [2018] VSCA 18; *Lee v The Queen* [2018] VSCA 63; *Ewan* (n 40); *Barrett* (n 36); *Williams v The Queen* [2021] VSCA 35.

assertion. The reality is that in nearly all cases in which an appeal court evaluates this argument, it relates to a sentence which is a prison term and the contention is that the length of the term of imprisonment is either too long or too short.[82] Hence, in most manifest error appeals the process undertaken by the court is to discern whether the numerical length of the prison term is appropriate. Logically, in order to evaluate the accuracy of a mathematical assertion, it is necessary to have a mathematical reference point. As discussed, one of the problems with that is that the settlement of a numerical range of proportionate sentences intersects with a value judgement tied to conceptions of justice held by the decision-maker.

Despite this, as we have seen, the courts have declared that manifest error is not a ground which admits of much analysis or argument and have instead contended that the answer to appeals on this basis is self-evident. The ground will be established only when the sentence is 'unreasonable or plainly unjust'.[83] We accept that there are several reasons that incline against precision in the determination of manifest error appeals. The first is that sentencing methodology does not involve a mathematical transparent step-wise process. Second, it is important to achieve individualised justice. Third, no two cases are identical and hence previous sentences do not set binding precedents for future sentences.

These caveats are genuine in the context of the instinctive synthesis approach to sentencing. Despite this, the arguments (individually or cumulatively) cannot rationally justify the conclusion that 'not much argument can be made in relation to this ground'. This is because even in the context of the admittedly opaque sentencing decision making process, numerical determinations are made and while it is necessary to achieve individualised justice, consistency in outcome is a cardinal rule of law virtue.[84] Ultimately what matters most to defendants and the community is that the sentence that is imposed is appropriate in all the circumstances. Indeed, this is the rationale underpinning manifest error appeals. At the core of the idea of manifest error is a value judgement that the penalty imposed is justified in the circumstances. The contradiction is that in order to make out the ground of appeal the penalty being too severe, or inadequate, the conclusion reached needs to be self-evident. It is illogical, verging on incoherent, to assert that there is little that can be said regarding a manifest error submission. The sentencing methodology is largely unstructured, but it does not occur in a vacuum. There are well-established and firm considerations which inform every sentence. These considerations form the bedrock around which every sentence must be imposed.

The considerations are the maximum (and, where relevant, minimum) penalty for the offence;[85] the statutory criteria which courts must follow in sentencing

82 It is rare for defendants to appeal non-custodial terms but even if they do, the same consideration applies.

83 See above n 23 and text accompanying nn 34–6 and 38.

84 For a discussion regarding the importance of legal certainty and predictability, see generally Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005); Tom Bingham, *The Rule of Law* (Penguin Books, 2011); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) ch 11, see especially 211, 214–6; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 270–6.

85 See Bagaric, Alexander and Edney (n 2) 205–7 [350.1180].

offenders (such as the objectives of sentencing law and the aggravating and mitigating considerations);[86] and the common law sentencing principles set out by the superior courts, including the principle of proportionality.[87] As noted above, the High Court has stated that so far as comparability with other sentences is concerned, consistency with the application of stated principles, as opposed to numerical consistency, is the main objective.[88] However, this is not a free pass for ignoring numerical consistency, because if courts are actually consistently applying the same principles then numerical consistency should logically follow. Moreover, the fact that manifest error appeals are not determined against a blank canvas is obvious given that counsel must advise clients on the merits of the ground and the Crown needs to assess every sentence from the perspective of whether it is manifestly lenient. These judgment calls are most likely to be grounded in some empirical data to make informed predictions as to the potential success of an appeal as opposed to a wholly impressionistic assessment of the sentence.

B Sentencing Statistics

For every sentence which is the subject of a manifest error appeal, there are a number of previous sentences that can be used, mathematically at least, as a starting point for comparative purposes. These statistics can be carved out in a number of ways, but the most obvious are the typical sentence given for the crime in question. Indeed sentencing principle requires courts to have regard to these statistics – when they are presented in a case. The High Court in *Hili v The Queen* (2010) 242 CLR 520 (‘*Hili*’) noted that despite the instinctive synthesis approach to sentencing, statistics of previous sentences for the same offence are a guide to the appropriate sentence although they are not necessarily determinative. The Court noted:

> … a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. … Past sentences ‘are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*’ (emphasis added). When considering past sentences, ‘it is only by examination of the whole of the circumstances that have given rise to the sentence that “unifying principles” may be discerned’.[89]

While the courts should be guarded in the manner in which they use sentencing statistics, it has been noted that this information is especially useful when it involves a large number of cases. *R v Bangard* was a sentence appeal relating to a manslaughter conviction.[90] The appellant was sentenced to 11 years imprisonment.

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86 Ibid 222–3 [400.100], 274–86 [450.1600]–[450.3400], 361–9 [500.100]–[500.2300]. See also the above text accompanying nn 14–15.

87 Ibid 199–203 [350.600]–[350.660].

88 See above Part III(A).

89 *Hili* (n 10) 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis in original) (citations omitted).

90 (2005) 13 VR 146.

The appellant produced a document setting out the sentences imposed by the Supreme Court of Victoria in 93 manslaughter cases in the approximately seven years prior to the appeal. The document demonstrated that there was only one other manslaughter case in which a sentence of 11 years or more was imposed. In agreeing to allow the appeal, Eames JA observed:

> A document such as that prepared by Mr McLoughlin [experienced Legal Aid solicitor] serves another useful purpose, in that it provides some guidance to a judge, necessarily only in a broad way, on the important question of consistency in sentencing.
>
> I do not suggest that in all cases such information ought [to] be provided to a sentencing judge by counsel, but certainly where the judge invites assistance in the sentencing task I can see no reason why counsel should be reluctant to provide it. Relevant and accurate sentencing information is much more readily available today than was the case in years past. In my opinion, the exercise of the sentencing discretion may be intuitive, but it neither is, nor should be, uninformed …
>
> In my opinion the Courts should not discourage counsel from providing such practical assistance as Ms Dixon [appellant's counsel] has demonstrated could have been provided to the judge in this case. The judge made it clear that he was inviting assistance in the exercise of his task; he was not inviting counsel to usurp his role.[91]

A similar approach to consistency was taken in *R v Henry* where the NSW Court of Criminal Appeal closely examined sentencing statistics in establishing a guideline judgment for sentencing armed robbery offenders.[92] Presiding over a five-member bench, Spigelman CJ focused on statistics concerning the 835 sentences imposed over an approximate period of four years for the offences of armed robbery and robbery in company. His Honour noted that the 'statistics strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences'.[93] The data did, however, reveal that most armed robbery offenders received a custodial term. This information was used to underpin a guideline judgment for sentences to be imposed for the offence of armed robbery.[94]

In *FD v The Queen*,[95] the Victorian Court of Appeal also noted that while caution should be exercised in placing too much emphasis on sentencing statistics, they can in some situations be compelling. In this case, the weight of the (albeit crude) statistics was instrumental in leading to a lower penalty. The Court noted that "Like" cases can only, at best, provide a general guide or impression as to the appropriate range of sentences. In that context it has been said on many occasions that "comparable cases" can only provide limited assistance to this Court'.[96]

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91 Ibid 152 [29]–[34] (agreeing with Buchanan JA with additional observations).

92 (1999) 46 NSWLR 346.

93 Ibid 371 [110] (Wood CJ at CL agreeing at 387 [213], Newman J agreeing at 398–9 [278], Hulme J agreeing at 399 [279], Simpson J agreeing at 410 [332] – each with additional observations).

94 Ibid 380 [162]–[165]. Referred to as a 'garden variety' offence.

95 [2011] VSCA 8 ('*FD*').

96 Ibid [31] ('*FD*'), quoting *Hudson* (n 22) 617 [29] (Ashley, Redlich and Harper JJA). See also *Hitchen v R* [2021] NSWCCA 293, where Wilson J stated at [85] (Bathurst CJ agreeing at [1], Harrison J agreeing at [2]):

> A claim of manifest excess cannot be determined by reference to statistical graphs; the sentencing exercise is much more complex and much more individualised than such an approach can comprehend. It is of little or no assistance to this Court to be pointed to such material in the absence of any detail concerning the cases reflected by the data. The limited utility of statistics is or ought to be well understood: *Wong v The*

However, the Court allowed the appeal basing some of its reasoning on the "major statistical discrepancy" when the sentence under appeal was compared with that for other incest offences. The Court stated: 'The sentencing snapshot and the examples set out above assist the intuitive synthesis to which we would, in any event, have arrived, namely that the sentence which his Honour imposed in this case was outside the range of a sound sentencing discretion'.[97] In *Crowley v The Queen*, Evans J in the Tasmanian Court of Criminal Appeal relied upon statistical data in agreeing that an offender's appeal on the ground of manifest excess for the offence of maintaining a sexual relationship with a young person be dismissed.[98] By way of additional remarks, his Honour stated:

> As Professor Warner observed in her text, *Sentencing in Tasmania*, 2nd Ed, par11.436, the data for sentences imposed during the period from 1995 to 2000 for a single count of maintaining a sexual relationship with a young person is insufficient to establish a range for such sentences. However, this Court's sentencing database now includes 45 sentences (excluding the sentence which is the subject of this appeal) imposed on offenders whose primary crime was maintaining a sexual relationship; 24 of those sentences were imposed subsequent to 2000, that is, the end of the period to which Professor Warner's observation relates; and 12 of those 24 sentences ranged between three years and eight years. This demonstrates that the upper segment of the range of sentences for the crime of maintaining a sexual relationship is well beyond the penalty imposed on the appellant of two years six months' imprisonment with six months of that sentence suspended.[99]

Thus, it seems that crude sentencing statistics remain important where there are a large number of cases. This is consistent with the approach taken by the High Court in determining the appropriate sentencing standards for an offence. In *R v Kilic*, the High Court emphasised that in order for a current sentencing practice to be established, it is necessary that there is a relatively large number of comparable recent cases, as opposed to a handful of cases involving a broadly similar factual scenario over more than a decade – especially if the maximum penalty for the relevant offence changed during this period.[100] The small number of cases, some of which were over 10 years old, referred to by the Court of Appeal in this case did not establish a current sentencing practice.[101]

Queen (2001) 207 CLR 584; [2001] HCA 64 at [59]; *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45, at [55]; *Owen v R* [2017] NSWCCA 54 at [72]; and countless other decisions of this Court that make that point.

97 *FD* (n 96) [34]. See also *Pham v The Queen* [2016] VSCA 259; *McFarland v The Queen* [2021] NSWCCA 79, [57] (Hoeben CJ at CL, Hamill J agreeing at [69], Wilson J agreeing at [70]).

98 [2003] TASSC 147.

99 Ibid [20]–[21] (agreeing with Crawford J and making additional remarks).

100 (2016) 259 CLR 256, 266–70 [21]–[31] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Kilic*'). In *DPP (Vic) v Dalgleish* (2017) 262 CLR 428, the High Court (in considering the appropriate penalty for incest) eroded the importance of current sentencing practice and instead stated that the most important consideration in imposing a penalty is to impose a just penalty according to the law. In reaching this conclusion, Kiefel CJ, Bell and Keane JJ noted that the instinctive synthesis requires assessment of a large number of considerations, none of which are necessarily determinative or controlling, including current sentencing practices: at 444–50 [47]–[68].

101 *Kilic* (n 100) 268 [25] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Ashdown v The Queen* (2011) 37 VR 341; *Anderson v The Queen* (2013) 230 A Crim R 38. The Victorian Court of Appeal used statistics

C Qualitative Measures

Sentencing statistics are, of course, simply a quantitative measure. Sentencing accuracy and consistency can be improved further by adding a qualitative component to the process.[102] Fortunately, reported cases provide a basis for a nuanced approach to contrast and compare similar cases and hence also provide useful scope for qualitative analysis. This emerges from the principle that judges in sentencing must provide reasons for their sentence,[103] which includes an explanation of the decided facts and all relevant sentencing considerations. This enables nuanced analogies to be drawn with the sentence in question. Sentencing reasons by appellate courts are replete with comparisons made with sentences from other cases. Indeed, some sentencing considerations, such as parity and equal justice,[104] necessitate a forensic comparison with other cases. The practice of sentencing courts being guided by other sentences for the same or similar offences in fact applies to all types of offences and most appeal grounds. This has been referred to as tariff sentencing.[105] Case by case analysis – the qualitative focus – however, are not adequate alone because, as has been noted previously, it facilitates cherry picking to incline to a certain sentence.[106] Thus, the combined statistical and case by case analytical approach is the most desirable. A wholly actuarial approach to sentencing is problematic because it undermines the principle of individualised justice.

The present reality is that in some manifest error appeal cases, courts take statistical and case comparative data and information into account and engage in a deeply considered reasoning process. Thus, in *Kulafi v The Queen* the Court stated:

> This case illustrates just how important, and effective, it is for counsel to advance well-developed arguments in support of the manifest excess ground. The burden for the applicant is to persuade the appellate court that the sentence imposed was 'not reasonably open ... if proper weight had been given to all the relevant circumstances of the offending and the offender'. It will therefore be of assistance to the Court, and to the advantage of the appellant, if argument is directed at the particular matters – whether of fact or principle – which, it is said, should persuade the appellate court that the sentence was outside the range.
>
> The term 'analytical framework' used by counsel for [Kulafi] aptly captures the importance of structure in such arguments. Just as reasons for sentence must be transparent, so too must appellate analysis of why a particular sentence is, or is not, outside the range be transparent.
>
> This case also illustrates the value of comparable cases. Here, as noted earlier, the applicants were able to point to decisions which were 'instructively different'. As

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extensively to develop new standard sentences in *Winch v The Queen* (2010) 27 VR 658; *Hogarth v The Queen* (2012) 37 VR 658; *Said v The Queen* [2020] VSCA 178, [79] (Beach, Emerton and Weinberg JJA).

102 In this way the comparison can avoid criticism for lacking detail and context: see, eg, *Kamal v The Queen* [2021] VSCA 27, [69] (Ferguson CJ and McLeish JA).

103 *R v Koumis* (2008) 18 VR 434, 439–40 [62]–[65] (Redlich and Kellam JJA and Osborn AJA).

104 *Green v The Queen* (2011) 244 CLR 462, 472–3 [28]–[29] (French CJ, Crennan and Kiefel JJ); *Gray v The Queen* [2021] NSWCCA 219; *Cook v The Queen* [2021] VSCA 293.

105 *R v Visconti* [1982] 2 NSWLR 104, 108 (Street CJ).

106 *DPP (Vic) v Stevens* [2020] VCC 1677, [127] (Tinney J).

> we have indicated, those decisions assisted with the assessment of (relative) offence seriousness and with the consideration of the applicable sentencing range.[107]

Other examples of cases where courts have undergone a detailed analysis of sentences in comparable cases in order to determine the outcome of a manifest error appeal can be found, although there is not an abundance of such cases. For example, in *R v Nguyen* the court relied heavily on a schedule of 68 sentences relating to drug importation in determining the outcome of a Crown appeal where the sentence was contended to be manifestly inadequate.[108]

D Transforming an Occasional Practice to a Structural Approach

Thus, the approach that we recommend should be taken in relation to dealing with manifest error appeals is already in a broad sense adopted in a small percentage of cases. It is not clear why some manifest error appeals are dealt with in a more methodical manner. Speculating for one moment, it might turn largely on the quality and depth of counsels' submissions reflected in the nature and extent of the case preparation, and the practices of individual judges in judicial reasoning.[109] But whatever the reason, we suggest that the present infrequent practice of a step-wise approach to manifest error appeals needs to be adopted and systematised.

The need to do this stems not only from logic but also legal imperative given that the High Court has stated that it is the role of appellate courts to provide sentencing guidance to lower courts. This should not only be in the form of sentencing principles but also sentencing outcomes – the ultimate principle being that courts should sentence consistently. Thus, we suggest that appeal courts should undertake a structured approach to manifest error appeals.

The first step is to identify the maximum penalty for the offence. This already occurs. The second is to access sentencing data regarding the current sentencing practices for the offence/s under consideration. Such data is already available for a range of offences in some jurisdictions. For example, in Victoria the Sentencing Advisory Council provides sentencing 'Snapshots' compiled for 25 of the most serious offences.[110] These snapshots provide comprehensive data on each offence, including the number of offenders sentenced for the offence in the previous

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107 [2021] VSCA 369, [50]–[52] (Maxwell P and Niall JA).

108 (2010) 205 A Crim R 106. There are some other more recent cases, where appeal courts across Australia have undertaken careful statistical and/or case by case analysis in deciding manifest error appeals: see, eg, *Merheb v The Queen* [2021] NSWCCA 224; *Klosowski v The Queen* [2021] SASCA 85; *R v Bates* [2021] QCA 229; *DPP (SA) v Jones* [2021] SASCA 114. See also *Clarke* (n 40); *Chartres-Abbott v The Queen* (2021) 291 A Crim R 225; *R v Cooper* (2021) 290 A Crim R 472; *Bramble v Western Australia* [2021] WASCA 191; *R v Hawke* [2021] QCA 179; *Tran v The Queen* [2021] VSCA 292; *Lawrence v The Queen* [2021] VSCA 291; *Paterson v The Queen* [2021] NSWCCA 273.

109 Knowledge systems are often produced by individual actors and their networks. See Ron Levi and Mariana Valverde, 'Studying Law by Association: Bruno Latour Goes to the Conseil d'État' (2008) 33(3) *Law & Social Inquiry* 805; Bruno Latour, *Reassembling the Social* (Oxford University Press, 2007); Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns*, tr Catherine Porter (Harvard University Press, 2018).

110 Sentencing Advisory Council (Vic), 'Snapshots by Offence', *Sentencing Statistics* (Web Page) <https://www.sentencingcouncil.vic.gov.au/snapshots-by-offence>. See also 'Judicial Commission of New South Wales (JIRS)', *Judicial Information Research System* (Web Page) <https://www.judcom.nsw.

five years; the proportion of people receiving a custodial term for the offence, the longest and shortest prison terms that were imposed and median sentences that were imposed. An updated Snapshot for each offence is published every two years. This comprehensive statistical analysis would set a presumptive range for an appropriate sentence. Prima facie it is arguable that sentences within 20% of the median sentence imposed for an offence would not be manifestly erroneous. An additional check should be undertaken by examining the details of individual sentences for the same offence/s within the past five years, incorporating a careful analysis of the similarity of aggravating and mitigating factors. A reasoned conclusion would then guide the outcome of the appeal.

The suggestion to use data from the most recent five years and then undertaking a detailed analysis of relevant similarities between the case at hand and previous sentences would represent best practice so far as dealing with manifest error appeals is concerned. The data set is already available in Victoria for most serious offences. It is not as comprehensive in other jurisdictions although Queensland Sentencing Spotlights are reasonably comprehensive for a range of offences.[111] Significant comparative data is also readily accessible in NSW through the resources provided by various interconnected agencies.[112]

While sourcing and interpreting the statistics for each offence will add to the workload of counsel and courts in manifest error appeal matters, the workload will be greatly reduced once the data is collated and interpreted for the first offence of its type, given that this would then form the template for dealing with other appeals for the same offence. A system could also be easily implemented for the continual updating of the relevant data. Thus manifest error appeal cases could still be finalised no less efficiently and certainly in a manner which would enhance the integrity of sentencing decisions and outcomes. This is not to suggest that judicial officers and counsel blindly apply and engage in a system of numerical averaging. Rather, it suggests that judicial officers and counsel incorporate the tariff range evident in analogous cases as an additional component in the intuitive synthesis.

Overall, this proposed structural approach to manifest error appeals has certain similarities to a guideline judgment in that it seeks to provide an authentic and reliable check or 'sounding board' against which appellate courts can compare and contrast sentences under appeal. It differs from a guideline judgment as they currently exist in Australian jurisdictions as it does not set benchmarks or starting points for application to a specific offence or the appropriate use of an available punishment option. It has a broader reach as a process mechanism, which is really in the nature of establishing a comparative tariff sentence of imprisonment for a

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gov.au/judicial-information-research-system-jirs/#:~:text=Developed%20by%20the%20Judicial%20Commission,statistics%20and%20other%20reference%20material> ('JIRS').

111 See Sentencing Spotlights: Queensland Sentencing Advisory Council (Qld), 'Type of Offence', *Statistics* (Web Page) <https://www.sentencingcouncil.qld.gov.au/research/reports/sentencing-spotlight>.

112 See New South Wales Bureau of Crimes Statistics and Research, 'NSW Criminal Courts Statistics Jul 2016 – Jun 2021', *Publications & Evaluations* (Web Page, December 2021) <https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2021.aspx>. See also 'JIRS' (n 110); Sentencing Council (NSW), *Sentencing Trends and Practices: 2021* (Annual Report, November 2022).

range of offences through utilising the available quantitative data and qualitative case analyses in a particular jurisdiction. Ultimately, the aim is to provide a transparent process and method with sufficiently relevant and detailed data to allow counsel to more accurately predict the outcome of a potential appeal and guide decision-making in relation to the merits or otherwise of proceeding with such an appeal.

V CONCLUSION

Manifest error is the most common sentencing ground of appeal in Australian criminal courts. It is also the most obscure and lacking in transparency in terms of the methodology adopted by the courts. The outcomes of these appeals are also unpredictable, although the available data indicates a moderate degree of success, indicating a surprising number of first-instance errors. This is surprising as the threshold test for manifest error is a departure from the tariff range that would otherwise be expected for a crime of that kind. In the context of a no-cost jurisdiction, this indicates a significant public expense in bringing appeals, and raises questions about sentences where appeals are not entertained.

The instinctive synthesis methodology for reaching sentencing decisions is opaque; however, this does not mean that the appeal decisions should not be informative, structured and transparent. Manifest error appeals should always involve a careful consideration of the statistical data for penalties imposed for the relevant offence, as well as sentencing judgments involving sufficiently similar cases. In this context, we have argued that the profession plays an important role in assisting courts in not falling into appealable error by providing sufficiently cogent materials to enable the sentencing judge to arrive at an appropriate sentence. This quantitative and qualitative approach we have labelled comparative tariff sentencing will ensure that manifest error appeals are dealt with in an informative and logical manner and the outcomes can then be used by lower courts to achieve greater clarity, consistency and equality in the sentencing outcomes. Any approach short of this necessarily involves the considerable risk that the outcomes of manifest error sentencing appeals are themselves manifestly flawed.