

The death of Veronica Nelson: Reconsidering the criminalisation of opiate use

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Mark Davison

Faculty of Law, Monash University, Australia

Patrick Keyzer 

Thomas More Law School, Australian Catholic University, Australia

Abstract

This article considers the preventable death of Veronica Nelson, an Aboriginal woman who had been denied bail and then suffered a terrible death in custody, which was the subject of recent bail reforms and a Coroner's Report that has recommended sweeping reforms to the management of people in custody. This article considers a reform that the Coroner and the Parliament did not, removing the criminal prohibition on opiate use.

Keywords

Prohibition, criminal justice, coronial inquiry, drugs

Warning: This article considers the death of an Indigenous person, and in some detail, and we warn that readers will find it distressing.

In 2020, Veronica Nelson, a proud Gunditjmara Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, was found dead in a Victorian prison at 7.55am on 2 January, 2020 following about 65 hours in custody and on remand,¹ after being denied bail in respect of 8 charges of shoplifting, two charges of breaching bail conditions and one breach of a Community Corrections order.² Nelson's family's advocacy for bail reform has been extremely determined, effective and important, and we touch on that reform below. However, in this article we focus instead on the criminal prohibition against opiate use. Specifically, we argue that prohibition of drug use puts people at risk in custody and that prohibition itself should be reconsidered for this

reason. We believe that the Coroner's Report should have addressed this issue.

Veronica Nelson's death was the direct result of the combination of the effects of opiate withdrawal and malnutrition. Nelson was a user of heroin and so her detention in custody on remand meant that she was involuntarily required to withdraw from opiates. While she was administered opioid replacement and anti-emetic medication in custody, she died for reasons summarised later in this article. (In offering descriptions of Nelson's death, we note the need to avoid repeating details of her death unnecessarily, and the need to be respectful, while noting also the need to provide sufficient detail to advance the arguments we make in this article). According to the Coroner's Report, somewhere between 50 per cent and 90 per cent of female prisoners in Victoria are undergoing some form of drug withdrawal.³ The Report does not delve into the reasons why Nelson was suffering from malnutrition.⁴

The Coroner's Report identified a litany of errors and omissions by multiple people and defects in law and

¹*Finding into Death with Inquest of Veronica Nelson* (COR 2020 0021) [2023] VicCorC 28312 (30 January 2023), paragraphs [7] to [45] ('Coroner's Report: Nelson').

²Coroner's Report: Nelson [317]–[328].

³This statement is based on the estimates of various witnesses rather than any empirical evidence (see Coroner's Report: Nelson [656]).

⁴For further consideration of the topic of malnutrition among Indigenous Australians, consider Natasha F Morris et al, 'The Indigenous Australian Malnutrition Project: The burden and impact of malnutrition in Aboriginal Australian and Torres Strait Islander hospital inpatients, and validation of a malnutrition screening tool for use in hospitals – study rationale and protocol' (2016) 5(1) *Springerplus* 1296.

Corresponding author:

Professor Patrick Keyzer, Thomas More Law School, Australian Catholic University, 115B Victoria Parade, Fitzroy, VIC 3065, Australia.
Email: Patrick.Keyzer@acu.edu.au

processes, and concluded that these errors, omissions and defects, particularly those present in Victoria's bail laws, all contributed to Nelson's death. Nelson had represented herself in her bail hearing and failed to satisfy the magistrate that 'exceptional circumstances' existed that would justify a grant of bail.⁵ There was evidence that counsel had been briefed to represent her, but he recommended Nelson represent herself because he believed her case for bail had no merit. The Coroner made an adverse finding against the barrister, concluding that his service to Nelson fell 'short of the standard expected of a legal practitioner' – we make no comment on this finding.⁶

The bail hearing was a pivotal moment in the sad chronology, and subsequently, reform energy has focused there. So, for example, Juliana Addison, the Member for Wendouree and Chair of the Women's Correctional Services Advisory Committee, acknowledged the pain experienced by Nelson's family and stated that the (then) Andrews government 'fully recognises the need for action to ensure that our bail system addresses the over-representation of Aboriginal people in our justice system, and the reforms put forward in this bill seek to work towards this important goal'.⁷ The Shadow Attorney-General Michael O'Brien referred to the coronial inquest report as 'harrowing reading' and to Nelson's treatment in custody as 'absolutely appalling'.⁸ O'Brien also noted that:

there is nothing inherent in this bill today that would prevent people who are held on remand from being treated appallingly in the way that [...] Nelson was treated. The onus is on the government. Do not just say, 'Well, we're changing the bail laws, therefore our job is done.' The job is also to make sure that people who are on remand, even for the best of reasons, are treated humanely. Nobody should press an intercom button 49 times to ask for help and be ignored in the way that [...] Nelson was.

Indeed. The almost 30,000 words of speeches from Victorian politicians speaking about the recent bail reforms were of a similar tenor: lamenting Nelson's death and expressing the opinion that bail reforms would help solve the problem. But as Mr O'Brien correctly observed, humanity requires more here.

Hopefully the bail reforms will reduce the number of people in custody. There are other issues considered in the Coroner's Report which increased the likelihood that Nelson would be in custody. The hyper-incarceration of Aboriginal women is one. No doubt those issues will be addressed in other publications and fora. In the interests of brevity, we are not going to talk about these issues because, in our opinion, the hyper-incarceration of Aboriginal

women is plainly wrong, and the human rights issues raised by this case are obvious.⁹

Instead, this article focuses on the unnecessary death of a human being and addresses an aspect of her death that is not considered in the Report, nor was it considered by any of the politicians when bail reforms passed a short time ago. It briefly considers the role that the legal prohibition of heroin played in Nelson's death.

For clarity, in advancing the arguments that we make here, we are not leaping to the conclusion that the shoplifting and other charges in respect of which Nelson were denied bail were necessarily connected to her use of drugs. It must be acknowledged that Veronica Nelson had not been charged with, let alone convicted for, illegal use of heroin. Nelson had not been convicted of any charges at all.

Notwithstanding these facts, it is certainly *possible* that, but for the criminalisation of heroin, Nelson would not have been in custody; would not have been required to involuntarily withdraw from opiates; and, if she could access safe drug use in the community, then medical treatment to prevent her death could or would have been given to her outside of the custodial system. All those factors contributed to her death. In short, it is quite possible that, but for prohibition, Veronica Nelson might still be alive. Prohibition puts people at risk of criminalisation and questionable treatment in custody. This is true regardless of whether there is any link between Nelson's shoplifting and her drug use.

The Coroner's Report makes a number of recommendations designed to prevent or reduce the possibility of similar tragic outcomes in the future. Some of them are discussed below. Implementation of many can be summarised as expensive, logistically difficult and, very possibly, politically impossible. Given that reality, our proposition is that Nelson's death and the implications of the Report's recommendations require a good faith engagement with the possibility of alternative regulation of opiates that results in fewer people committing crimes to pay for their drug use and, therefore, fewer people who use drugs in custody.

As argued elsewhere by Kate Seear, the knee-jerk reaction to reject any proposal for ending prohibition is based on a 'black hat' approach – an approach that is all too easy to take. Seear notes that:

the policy landscape is dominated by a concern with the problem of what changes to drug law might do rather than a concern for what drug law presently does, including the numerous and widely documented harms generated and/or exacerbated by existing approaches. In other words, policy and law reform debates often focus on the fear of a future without prohibition rather than seriously addressing the clear and present problems of failed prohibition.¹⁰

⁵Coroner's Report: Nelson [317]–[328].

⁶Ibid [313].

⁷Victoria, *Parliamentary Debates*, Legislative Assembly, 30 August 2023, 3234 (Juliana Addison).

⁸Victoria, *Parliamentary Debates*, Legislative Assembly, 30 August 2023, 3229 (Michael O'Brien).

⁹See, eg, the remarks of Ms Nina Taylor, Member for Albert Park, in her speech on the bail reforms: Victoria, *Parliamentary Debates*, Legislative Assembly, 30 August 2023, 3251. The Coroner's Report addresses human rights issues in detail, so they will not be considered in detail here.

¹⁰Kate Seear, 'Drug policy's past, present and future: Where should Australia head now?' (2020) 45(4) *Alternative Law Journal* 254–60.

No scheme of regulation of drugs such as heroin or other opiates will ever be perfect in the eyes of every observer and so any proposal for altering the status quo can be criticised. However, as Seear points out, what that knee-jerk reaction fails to engage in is a similar black-hat approach to the current system of prohibition. It is an exercise in 'looking over there' rather than looking at the legal system that we have right here, right now, and what it does to people – right here, right now.

This article turns the spotlight on the current legal system by considering one example of the human and economic cost of prohibition. It starts with a brief description of the causes of Nelson's death and the surrounding circumstances considered by the Coroner to have contributed to her death. It then considers the role of legal prohibition of heroin in creating those circumstances. Finally, it addresses other, obviously, smaller but still very significant costs associated with Nelson's death and the potential costs of attempting to prevent future deaths of that nature in the future.

Brief description of the causes of death and surrounding circumstances

The immediate medical cause of Nelson's death was 'complications of withdrawal from chronic opiate use and Wilkie Syndrome in the setting of malnutrition'.¹¹ The complications of acute opiate withdrawal might include severe vomiting that would be capable of leading to fatal electrolyte imbalances leading to cardiac arrhythmia.¹² Wilkie syndrome 'is an uncommon condition "characterised by the compression of the third, or transverse, portion of the duodenum between the aorta and the superior mesenteric artery"'.¹³ The compression occurs because, in individuals who are cachectic, there is a loss of the pad of fat that normally sits between the aorta and the duodenum.¹⁴ The consequence of compression of the duodenum is chronic, intermittent, incomplete obstruction of the duodenum that prevents the stomach from emptying effectively, causing distention and delaying absorption of nutrients. The malnutrition caused the loss of the pad of fat that in turn facilitated the compression of the duodenum between two arteries. At the time of her death, Nelson weighed about 33 kilograms although she was 160cm tall. The medical evidence is that she would not have weighed much more than 33 kilograms when taken into custody (notably, and surprisingly, her weight was recorded as just over 40.7 kg – yet, on admission to the mortuary, her

weight was recorded as 33 kg).¹⁵ The malnutrition had been present for quite some time prior to incarceration, yet the rostered medical officer did not think that Nelson was unwell or suffering from malnutrition. The Coroner rejected this opinion of the rostered medical officer.

However the consequence of all three factors of withdrawal, malnutrition and Wilkie's syndrome was that Nelson was in enormous pain while in custody and experienced extreme, projectile vomiting on numerous occasions over the same period that, in turn, caused dehydration and electrolyte imbalances.¹⁶ The Report outlines multiple failures of the custodial system that led to her incarceration, failure to identify the extent and seriousness of her illness, and failure to adequately respond to her situation.¹⁷ They include issues associated with Victoria's bail laws; concerns about the assistance provided by the barrister (noted above)¹⁸ and the Report then went on to address multiple issues relating to Nelson's medical care while in custody, including the dismissal of her multiple calls for medical help.¹⁹ (As we note later, so long as drug use is illegal, there must be stigma associated with that use which may cause some workers to have negative or problematic attitudes that may impact their care of drug users. We make no such assertion here, but it is a point that can be made.)

We understand that discussing the death of a person in detail is at the very least discomfiting, and in some cultures, can be regarded as disrespectful. However, in recounting the facts above, we mean only to draw attention to something torturous that could have been avoided with further reform to the criminal justice system, beyond bail reform. The question of whether a custody environment that requires a person to endure what we have summarised above is a form of torture is, to our mind, a legitimate question to raise, and we intend to explore it in subsequent work.²⁰

The association of prohibition with Veronica's death

All those issues appear to turn on the critical issue of the legal system's criminalisation of the supply, use and possession of heroin. The prosecution case was that Nelson was 'a recidivist shop thief' who had been 'stealing to support her drug habit and for living expenses'.²¹ In other words, Nelson may well have stolen to buy illegal drugs, which are expensive, as a consequence of that illegality. (As noted above, this connection was asserted but should not be assumed.) If those drugs had been available to her in a

¹¹ Coroner's Report: Nelson [209], [213].

¹² Ibid [204].

¹³ Ibid [201].

¹⁴ Coroner's Report: Nelson [155].

¹⁵ A recording that was 'the subject of dispute': Coroner's Report: Nelson [425.5] and [426], and also [515]–[520].

¹⁶ Coroner's Report: Nelson [24]–[40].

¹⁷ Ibid Appendix B.

¹⁸ Ibid [871]–[881].

¹⁹ Ibid [24], [25], [35], [37], [40] and [41].

²⁰ It may be noted in passing that, even where Aboriginal Australians bring cases to the United Nations Human Rights Committee which succeed in arguing that governments have treated them with cruelty, there is no guarantee that Australia will actually respond to the recommendations of that Committee: see further Human Rights Committee, *Views: Communication No 2900/2016*, UN Doc CCPR/C/132/D/2900/2016 (19 November 2021) ('*AS v Australia*').

²¹ Coroner's Report: Nelson [320].

lawful manner and in a context that dealt with her use of drugs and associated medical matters as a social and health issue, those offences might not have occurred so frequently or at all. If those offences had not occurred, she would not have been in custody, regardless of the Victorian bail laws. If she had not been in custody, she would not have been subject to involuntary withdrawal from opiates.

Nelson's malnutrition was probably a long-term condition, possibly attributable to multiple causes. These might have included the suppression of appetite caused by use of heroin and other factors such as a lack of funds for food due to the cost of supporting her drug use in an environment of illegality. It might have been helpful if those matters had been considered in the course of the coronial inquiry.

What one could easily conclude, though, is that those using the lens of a regulatory and health system that treated drug use as primarily a social and health issue would be alive to the real possibility that a 37-year-old person who uses drugs, weighs less than 35 kilograms and is 160 centimetres tall would be suffering from malnutrition and likely also suffering other related medical issues. It is telling to consider the evidence of Dr Runacres, the doctor who conducted the assessment of Nelson when she was received at the Dame Phyllis Frost Centre. Dr Runacres said:

Yes, she's vomiting and, yes, she's withdrawing from heroin and I'm sure that's incredibly uncomfortable, but that's not very sick.²²

We say nothing further about this assessment and the treatment offered. However, even if Nelson's malnutrition had not been addressed directly, it is also the case that if she had developed Wilkie's syndrome while living her life in the community, the consequences of doing so would not have been exacerbated by involuntary withdrawal from opiates. Proper diagnosis and treatment of it within the general health system would have improved her prospects of survival.

It is only through the myopic lens of a punitive criminal system that people employed in that system could look at a person in such physical condition and think that the real issues were whether she could show special circumstances entitling her to bail on charges that in the circumstances would have been unlikely to carry a custodial sentence²³ and whether her health condition justified the medical attention that she received. As to the former of those points concerning bail laws, the Coroner made significant findings about Victoria's bail laws which both major political parties have accepted.

As to the latter point about her medical treatment in custody, the Coroner stated in the Report:²⁴

On the weight of the available evidence, I find that Veronica's care and treatment by CV and CCA staff while at DPFC was

influenced by drug-use stigma, and that this causally contributed to Veronica's passing.²⁵

Some of the other costs of prohibition

After making various findings as to the factors contributing to Nelson's death, the Report goes on to make 39 separate recommendations in Appendix C. None of the recommendations addressed the topic of the criminal prohibition of drug use. The first of those recommendations by the Coroner is as follows:

1. I recommend that the Victorian government consider funding allocations sufficient to facilitate achievement of the recommendations that follow.

No doubt the service system recommendations made are important and worthy of careful consideration. However, they are expensive, and their implementation would require the recruitment and training of staff. They assume that such staff are available for recruitment. Some of them also relate to the improvement of support for defendants, especially Aboriginal and Torres Strait Islander defendants.

For example, Recommendations 13 and 14 are:

13. I recommend that the Magistrates Court of Victoria ensure that the Court Integrated Services Program (CISP) is staffed whenever the court is open, including throughout Bail and Remand Court sessions.

14. I recommend that the Magistrates' Court of Victoria employ sufficient Aboriginal or Torres Strait Islander staff in roles (however described) within the court to provide assistance to and, where necessary, advocacy for, Aboriginal and Torres Strait Islander court users including people remanded in custody ...²⁶

For readers from outside the state of Victoria, the Court Integrated Services Program is a program under which magistrates refer a person on bail to drug treatment services, crisis and supported accommodation, disability and mental health services, acquired brain injury services and Koori specific purposes. The accused person is assigned a case manager who meets them regularly.

Some commentary on Recommendation 14 might be useful here, particularly the reference to employing 'sufficient' staff. Whatever number would be sufficient will depend on how many court users are before the courts. At some point in time, there needs to be an analysis of how many defendants, including and particularly Aboriginal and Torres Strait Islanders, are court users – not because they are also drug users but because of how our social, medical and legal system treats them because they are drug users. Remembering the Report's comment that somewhere between 50 and 90 per cent of female prisoners are estimated to be suffering from some form of drug withdrawal, how many

²²Ibid [497].

²³Ibid [336].

²⁴Ibid [676].

²⁵CV is Corrections Victoria, CCA is Correct Care Australasia and DPFC is the Dame Phyllis Frost Centre.

²⁶See Appendix C, Coroner's Report: Nelson.

of these people are in prison because they have committed crimes for the purpose of paying for illegal drugs? (We note, again, that we are not asserting this was Veronica Nelson's situation, and do not need to in order to make our point.)

Other recommendations in the Coroner's Report relate to improvements in the medical treatment of people who use drugs in the custodial system.

20. I recommend that Justice Health:

20.1. immediately amend the Justice Health Opioid Substitution Therapy Guidelines (OST Guidelines) to enable medical practitioners to prescribe opioid substitution therapy to women [w]hose [sic] health may be at significant risk by being required to undergo opiate withdrawal; and

20.2. urgently review of [sic] the OST Guidelines to ensure that all women with opioid dependencies are given access to opioid substitution pharmacotherapy **upon reception to prison**, including the option of methadone or suboxone and their long-acting injectable buprenorphine formulations, **irrespective of the length of incarceration**. [emphasis added]

...

22. I recommend that the Victorian Government establish a sub-acute unit at the Medical/Health Centre at Dame Phyllis Frost Centre available to all prisoners who require it, and that includes oversight by a specialist who has completed Advanced Training in Addiction Medicine.

...

29. I recommend that Justice Health require custodial Health Service Providers to:

...

29.4. ensure medical practitioners employed or contracted by the Health Service Provider for a period of more than six months complete training equivalent to the Royal Australian College of General Practitioners' Alcohol and Other Drugs GP Education program within six months of the practitioners commencing.

29.5. ensure registered nurses employed by the Health Service Provider complete the Australian College of Nursing's Continuing Professional Development modules in:

29.5.1. addressing AOD Use in Diverse Communities; and

29.5.2. opioid Withdrawal Nursing Care and Management.

29.7. employ a full-time specialist who has completed Advanced Training in Addiction Medicine.

Recommendation 29 was also directed at Correct Care Australasia (CCA), 'a private company contracted by DJCS to deliver primary healthcare in 13 public prisons including DPFC'.

We think these are very worthy proposals. We also noted that there are significant costs associated with recruiting medical staff with specialist expertise and even more costs in ensuring access for prisoners to opioid substitution therapy 'irrespective of the length of incarceration' and 'upon reception to prison', especially at times of the year covering public holidays. In addition,

Recommendation 22 recommends an entire medical unit be established within a prison. It is not clear how large the unit should be but, given the reference in the Report to between 50 and 90 per cent of women prisoners being in some form of withdrawal,²⁷ it would seem to be a reasonable possibility that the unit would have to be quite large. Other difficulties might be that recruitment of relevant experts might be difficult if they prefer to operate within a non-custodial setting where withdrawal, if it occurs, is voluntary and possibly, privately funded, rather than as the inevitable and involuntary result of incarceration.

We would also add one further human cost that is not specifically identified in the Report. Much is rightly made in the Report about concepts such as the attitude of some in the custodial system towards prison inmates suffering from withdrawal. We do not comment on any particular individuals who were the subject of adverse findings by the Coroner, but we also note the systemic difficulties within which they and others operate. We question whether asking for more resources and more training to combat compassion fatigue will have significant effects if it remains the case that the criminal legal system both continues to criminalise drug use and to effectively induce drug users to turn to crime, to fund that illegal drug use. So long as drug use is illegal, there must be stigma associated with that use which will cause some workers in the criminal justice system to have negative or problematic attitudes that may impact the care of drug users who have been incarcerated.

All the recommendations in the Report operate within a paradigm that assumes the continued prohibition of heroin; assumes that at least some heroin users will commit crimes to fund their use; and that they will end up in custody as a result. Those drug users in custody will then be forced into involuntary withdrawal with attendant medical issues and, as was the case with Nelson, other possible underlying complications that are likely to be caused or exacerbated by the combination of heroin use and its prohibition.

Despite not directly addressing the issue, the Report shines a light on some of the costs of prohibition through the lens of the unnecessary death of Nelson and identification of some of the action that needs to be taken to prevent deaths in the future. The cost of that action would be significant and, even then, it would not address anywhere near all the imposts caused by prohibition, such as the number of crimes committed by drug users.

In turn, that reality challenges the legal status quo of prohibition to justify those costs. In so doing, it also demands a conversation about alternatives that might reduce the extent of human misery caused by prohibition. For some decades, one of the justifications for prohibition has included a moralistic perspective that drug use is an 'evil' to be combatted at all costs.²⁸ There are multiple reasons why such a simplistic approach is both unhelpful and inaccurate. We dispute the proposition that the costs of prohibition

²⁷Coroner's Report: Nelson [656].

²⁸The *Single Convention on Narcotic Drugs, 1961*, which is the backbone of federal regulation of narcotics in Australia, refers to addiction as 'evil' (Resolution III). The language, internal morality and consequences of regulation based on this treaty require urgent review and reconsideration. This Convention (as amended by a 1972 Protocol which maintains the reprobation of addiction) is referred to in the Preamble and set out in Schedule 1 of the *Narcotic Drugs Act 1967* (Cth). The Preamble to the Convention in turn states that 'addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind'.

can be justified simply by cloaking it in moral superiority that attempts to justify the knee-jerk reaction to questioning prohibition mentioned earlier in this article.

The prevalence of heroin use in Canberra in the late 1980s led to plans for an Australian controlled trial for users.²⁹ The National Centre for Epidemiology and Population Health at the Australian National University developed a feasibility study, and the reports that were produced and the approach that was recommended generated significant support in the ACT Legislative Assembly. The trial was endorsed by all Australian Health Ministers. However the trial required federal approval, because ACT legislation was at this time subject to disallowance by the Governor-General (acting on the advice of federal Ministers).³⁰ In June 1997 the trial was granted federal approval but this was withdrawn by then Prime Minister John Howard after a misinformation campaign run by tabloid newspapers (particularly the *Daily Telegraph*).³¹ The Prime Minister concluded that allowing the heroin trial to go ahead would 'send the wrong signal to the community'.³²

The history of the failed ACT heroin trial illustrates that the political difficulty associated with winning approval for heroin prescription should not be understated. There are also difficult clinical issues associated with 'onboarding': that is, whether a decriminalised, heroin prescription model should only be available for *continued* use, rather than first use, per se. We do not resolve these issues here, and they were the subject of lengthy analysis in the reports informing the ACT proposal. Our contention is that a far more sophisticated consideration of prohibition needs to occur in light of Nelson's death which also considers the potential alternatives. In an article of this length, it is not possible to

consider those alternatives in any depth other than to suggest that close consideration should be given to addressing opiate use as primarily a social and health issue rather than a criminal issue. What can be said is that Nelson's death is but one tragic example of the costs of prohibition.

Our conclusion is that a burden now falls upon those who support prohibition to justify those costs or to otherwise engage in a good faith consideration of alternatives.

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ORCID iD

Patrick Keyzer  <https://orcid.org/0000-0003-0807-8366>

Mark Davison is an Adjunct Professor in the Faculty of Law at Monash University.

Patrick Keyzer is a Professor in the Thomas More Law School at the Australian Catholic University.

²⁹See Susanne Christie, 'Trial by media: Politics, policy and public opinion, the case of the ACT heroin trial' (1998) 10(1) *Current Issues in Criminal Justice* 37–51.

³⁰Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks Australian Constitutional Law* (Lexis-Nexis, 9th ed, 2013) [4.6.27] and [4.6.34].

³¹Christie (n 29) 40.

³²Gabriele Bammer, 'The ACT heroin trial: Intellectual, practical and political challenges' (1997) 16(3) *Drug and Alcohol Review* 287–296; and Glenda Lawrence, Gabriele Bammer and Simon Chapman, "'Sending the wrong signal": Analysis of print media reportage of the ACT heroin prescription trial proposal, August 1997' (2000) 24(3) *Australian and New Zealand Journal of Public Health* 254–264.