

## **Part 4**

# **Bereaved Families Holding the State to Account**

This part of the book includes three separate chapters which all relate to how family participation can ensure there is accountability following deaths in custody by providing scrutiny of State actions that might have either caused or not prevented a death where there was an established duty of care on the State. It is vital for a democratic society that empowers State agents or agencies to restrain or detain individuals for the overall benefit of society to make sure they have a robust system which will scrutinise any State actions, identify failings and hold people to account. As has been shown, the inquest system is the primary process for investigating deaths in custody, so how it provides accountability is vitally important. As accountability relates to public confidence in the actions of the State, the transparency of any system holding the State to account can impact not just on the legitimacy of the system itself but also the legitimacy of State actions. Therefore the ability of the inquest system to hold State agents or agencies to account is intrinsically important, as are any factors that affect the perceived legitimacy of the system.

Ensuring effective and fair participation of bereaved families is linked to making sure the inquest process is fair; and a fair process can have both an instrumental and intrinsic impact. An instrumental impact focuses on whether factors directly influence the outcome. So a fair process would only be important if it had the effect of producing a fair outcome. Allan argued the fairness of procedures were important primarily in justifying the accuracy and therefore validity of outcomes.<sup>1</sup> However, just focusing on the instrumental impact ignores the intrinsic value of a fair process beyond whether it directly ensures a fair outcome. A fair process can have intrinsic value in two ways. Firstly, public perceptions that a fair process will lead to a fair outcome will increase their confidence in a process that is seen as fair. Secondly, ensuring a fair process has value in of itself, regardless of whether it impacts on the outcome, as it is morally important for the State to act in a fair way.

The first intrinsic benefit is linked to an understanding that a fair process makes a fair outcome more likely, even if it cannot actually guarantee it. Fair procedures can minimise the dangers of coming to incorrect decisions, therefore

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<sup>1</sup>Allan (1998, p. 497).

maximising the opportunity of the outcome being correct.<sup>2</sup> This is distinct from the instrumental benefit as argued by Allan for a number of reasons. Firstly, a fair process cannot guarantee a fair outcome. Secondly, whether an outcome is fair or not can be disputed. There can be a difficulty in objectively judging the fairness or correctness of the outcome as perceptions of fairness of outcome may differ among participants. So it is therefore important that regardless of the actual impact on outcome, participating in a fair process increases the perception that a fair outcome will be achieved.<sup>3</sup> Fuller has pointed out that if 'the function of law is to create an orderly interaction among citizens' then the perception of how a fair outcome is best achieved will be fundamentally important.<sup>4</sup> So as fair procedures offer the highest opportunity for a fair outcome, perceptions of fairness will then have a positive impact on the belief in the fairness in the system.

There is a second intrinsic benefit of a fair process regardless of whether it increases the likelihood of a fair or accurate outcome. This follows Kant's belief that to act in a moral way has value regardless of the outcome.<sup>5</sup> In respect to justice, Lerner argued that there was such an intrinsic value to justice.<sup>6</sup> This is particularly relevant if the actions of State authorities are being scrutinised. Kessler described due process as important not just because procedural rules have the benefit of providing a mechanism for ensuring the truth but because compliance with certain principles also ensures the State does not use its power arbitrarily.<sup>7</sup> So the State complying with basic principles of fairness is of benefit to ensure the legitimacy of the State as a democratic authority.

In summary, incorporating both the distributive and procedural theories of justice, a fair process can have instrumental and intrinsic value. The instrumental value of a fair process relates to the effect on the outcome; so factors like the quality of decision-making and the parties having the opportunity to influence the process affect whether a fair outcome is achieved. A fair process can also have intrinsic value, distinct from the impact on the outcome but often linked to the morality of fair treatment for all. So this part of the book will consider both instrumental and intrinsic impacts of a fair inquest system allowing effective and fair participation for bereaved families. The instrumental effect of bereaved families participating in an inquest is considered in Chapter 7: it looks at how families can have a direct impact on the outcome of an inquest, as well as instigating change in the law or policy by campaigning or bringing legal challenges. The intrinsic value offered by families participating in the inquest process focuses on increasing the legitimacy of the process, and this is described in Chapter 8.

Bereaved families can benefit the likelihood the inquest system holds State agents to account in different ways. The first is an instrumental effect, as by increasing the likelihood that an inquest will reach a fair outcome, families can

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<sup>2</sup>Newman (1985, p. 1648).

<sup>3</sup>Greenberg and Folger (1983).

<sup>4</sup>Fuller (1969, p. 229).

<sup>5</sup>Kant and Gregor (1996).

<sup>6</sup>Lerner (1982).

<sup>7</sup>Kessler (2004, pp. 1213–1214).

ensure any failings by the State are identified. The second way relates to the role some families take on to disseminate and publicise outcomes, which increases the transparency of the process. The third way families benefit accountability is by improving the intrinsic value of the system by increasing the perceived legitimacy of the system itself. The author relied on procedural justice theory to link fair participation of participants in a process to increased legitimacy, and this research proves this theory is relevant for inquest processes. Chapter 9 considers how families' participation can ensure the State is held to account in relation to any failings relating to a death in custody.