Defectively Representing Representative Democracy — A Reply

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In the preceding article, David Wiseman has addressed an important issue which arises if one accepts the view[1] that the Australian Constitution requires relative equality of electorates, namely the issue of what factors may legitimately justify departures from strict numerical equality of electorates. This is clearly a complex question and one which would require considerable examination if the High Court were to accept the alleged requirement. David Wiseman is right to attach significance to the issue and his contribution is to be welcomed for raising some of the arguments that need to be addressed. For now, I would only make two brief points in response to his comments about my position.

His main argument is that my article failed 'to show why, if the traditional factors need to be accommodated within the electoral system, other factors — in particular, minority interests — do not also need to be accommodated'.[2] With respect, this argument proceeds from a misapprehension as to my position regarding the 'traditional factors'. In referring to the factors that have effectively been accepted judicially in Australia[3] and Canada,[4] I was not intending to endorse any particular list of

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1. Which I advanced in 'Apportioning Electoral Districts in a Representative Democracy' (1994) 24 UWAL Rev 78.
2. (1995) 25 UWAL Rev 78.
3. In *A-G (Cth), ex rel McKinlay v Cth* (1975) 135 CLR 1, the High Court upheld s 19 of the Commonwealth Electoral Act 1918 (Cth) which contained 5 grounds for departing from strict equality.
4. In *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16, the Supreme Court of Canada upheld the electoral boundaries drawn pursuant to

grounds that should be allowed in justifying departures from equality. That exercise would require, at the least, a lengthy article of its own. Rather, I was attempting to indicate the nature of the task that would confront the court if a requirement of relative equality were to be adopted. I suggested two (different) lists of considerations as indicating the kind of factors that the court would need to rule on and then outlined how the court would need to proceed if those factors were accepted. My point was simply that the court would first need to decide whether factors of the kind listed (and others not listed) could be regarded as conducive to effective representation. It would then need to assess whether specific departures from equality in particular electorates could be justified by reference to those grounds accepted as legitimate.

The thrust of the remainder of David Wiseman's note appears to be that representation of some (but not all) minority interests is compatible with representative democracy and can therefore justify some departures from equality. He is right to point out that the Supreme Court of Canada has acknowledged, obiter, that this can be a legitimate consideration.[5] It may also be right that the representation of minorities should be considered to have some relevance to the apportionment of electorates. The question is to what extent that factor should be accommodated.

There can be little doubt that it should be impermissible to draw electoral boundaries deliberately to dilute the voting strength of identified minorities. The fair representation of minorities within a scheme for equal electorates might also be regarded as a legitimate consideration for those charged with drawing the boundaries,[6] although taking that course encounters serious difficulties such as determining what constitutes a relevant minority[7] and reconciling the claims of different minorities within the same area.[8] A case

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Saskatchewan legislation which contained a different list of grounds: see Creighton supra n 1, 94, n 77.

5. It was unnecessary for the court to do so, since the legislation in question did not include that factor.

6. As Wiseman notes, there may well be ways of enhancing minority representation without departing from equality. However, even equal electorates the boundaries of which are drawn to achieve minority representation can still be invalid: *Shaw v Reno* (1993) 113 S Ct 2816.

7. It may be noted that neither the Supreme Court of Canada, in *Reference re: Electoral Boundaries Commission Act* supra n 4, nor Wiseman has indicated which minority interests merit such consideration. Wiseman seems to acknowledge that determining this issue would involve 'somewhat arbitrary opinions'.

8. It seems likely that almost any attempt to enhance the position of one minority could adversely affect the position of some other group claiming to be a relevant minority: see eg *United Jewish Organisations of Williamsburgh v Carey* (1977) 97 S Ct 996, in which Hasidic Jews objected that a districting plan designed to enhance the representation of one minority (non-white voters) in New York had the effect of diminishing the voting strength of the Jewish minority. The Supreme Court effectively rejected the claim of the

might also be made for allowing departures from equality in particular electorates in an effort to ensure the proportionate representation of a relevant minority in the legislature as a whole, although the difficulties outlined previously would again arise. It might also be objected that manipulating electoral boundaries in such a way assumes uniform voting patterns within the minority group[9] and encourages an expectation that those elected by the minority will represent only the minority interest, rather than all constituents. But all of these possibilities can be distinguished from attempting to achieve the *over-representation* of a particular minority. That objective is more fundamentally objectionable in that it threatens the fair representation of all others. Indeed, if applied across all electorates, it could result in the favoured minority group obtaining majority representation, which is at odds with the most basic notions of democracy.

In the final analysis, the issue of minority representation is unlikely to be critical to the determination of the *McGinty* case.[10] At best, a government might be able to justify a departure from equality in a particular electorate[11] on the ground that it assists an otherwise under-represented minority to obtain proportionate representation in the legislature. It is quite another thing to justify the disproportionate representation of those who reside outside the metropolitan area of Perth as the accommodation of a minority group. For a start, it is difficult to see that such disparate persons constitute a group with common interests requiring separate representation, if indeed they are a 'group' at all. More significantly, it is submitted that the systematic 'over-representation' of this or any other 'minority' undermines the fair representation of others and should not be regarded as compatible with representative democracy. Accordingly, it still appears that the burden of justifying the disparities in the Western Australian electoral system would be insurmountable on this or any other ground.

Hasidic Jews to be regarded as a relevant minority by treating them as part of the white majority, which was not under-represented.

9. It might be argued that if the purpose of the accommodation of the group's interests is to enable their representation in the legislature, one condition for regarding a group as a relevant minority is that its members have common interests and are likely to vote in the same way. If this view were adopted, bloc voting would not be assumed; it would need to be demonstrated.

10. *McGinty v WA* High Ct No P44 of 1993: see Creighton supra n 1, 101.

11. Recent Canadian cases have emphasised that the onus to establish justification lies with those who support the variation and that the justification must be established on a division-by-division basis. Mere assertion of a justification is not sufficient; proof is required: see *MacKinnon v Prince Edward Island* (1993) 101 DLR (4th) 362; *Reference re: Electoral Divisions Statutes Amendment Act* (Alta) (1993) 119 DLR (4th) 1, 12-13.