

# National Human Rights Consultation Submission

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**Submission Text:**

If we are to discuss the question of a bill of rights, we need to ask which rights we are talking about. In particular, we need to distinguish between political or liberal rights, and social justice rights. The former are largely negative (freedom from) rights of non-interference. These involve protecting people from undue interference by the government and ensuring their right to discuss whatever matters they see fit. These are the sorts of rights that can be and should be clearly defined in a bill of rights and enforced by the courts. These rights are necessary to underwrite the process of democratic argumentation. They are the preconditions for social cooperation, but are not themselves the terms of social cooperation. Social justice rights are rights that derive from the terms of social cooperation. These are largely positive (freedom to) rights. These are important rights, because to realise autonomy requires not only a formal protected space (freedom from), but also the material perquisites (freedom to) of genuine autonomy, such as education, health and so on. But the terms of social cooperation are the proper and ongoing topic of democratic politics, and are not to be legislated once and for all and enforced by the courts. These rights are, practically, not the sort of things that can be effectively protected by the courts, and politically, not the sort of things that should be taken out of the domain of democratic negotiation. A bill of rights is needed to clearly articulate and defend the very basis upon which democratic politics can function in its task of setting the fair terms of social cooperation. But the actual terms of social cooperation and, often more importantly, the execution of those terms, is a matter for ongoing negotiated democratic agreement, not a matter for the courts. A bill of rights is needed and only needed to protect a sphere of freedom that ensures that all persons can publically contest political debate about the terms of social cooperation. While, without legal enforcement of positive rights, it will remain the case that the marginalised and the disadvantaged will be, practically, often unable to contribute effectively to the political process in order to change the terms of social cooperation, it is sheer delusion to think that the courts can solve this problem. The only enduring and widespread solution is political inclusion, itself a political issue, and not legal recourse. Negative rights are to be protected by courts in order to ensure that positive rights and the execution thereof can be negotiated (and renegotiated) politically. The role of rights is to ensure a free sphere of political debate about the terms of social cooperation, by protecting the preconditions of such debate, and not to close down political debate by stipulating the very terms of social cooperation.