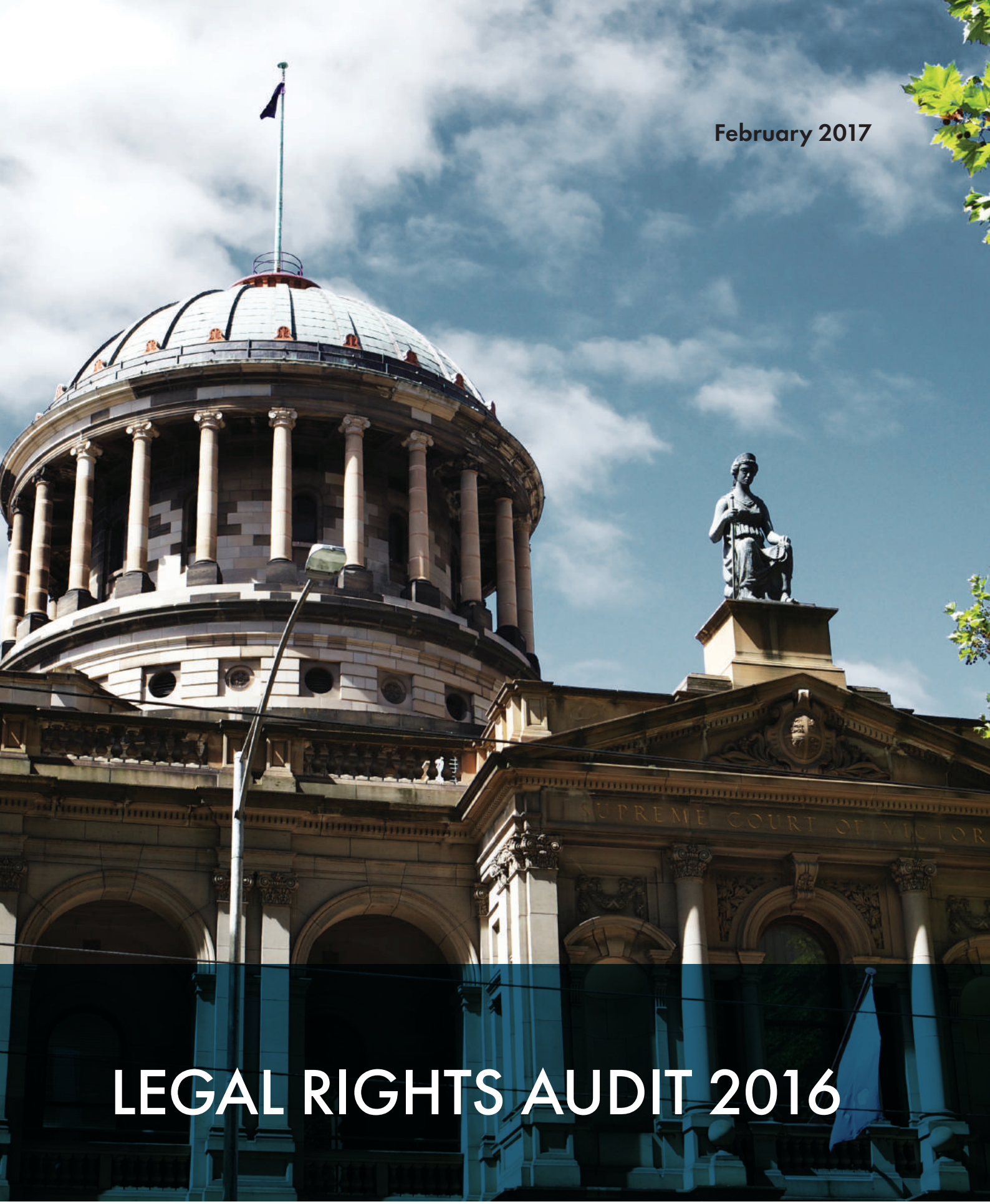

February 2017

LEGAL RIGHTS AUDIT 2016

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Institute of Public Affairs
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LEGAL RIGHTS AUDIT 2016

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The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy.
Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

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Acknowledgments

We would like to thank Jake Fraser for his indispensable assistance in conducting research for this report.

Executive summary

This report illustrates the ongoing erosion of legal rights that persists in Australia. This has been measured by an analysis of the content of all legislation passed by the federal parliament in 2016.

Our research is an audit of Commonwealth legislation passed in 2016, building on research the Institute of Public Affairs began in 2014.[1] The IPA's 2014 report *The state of fundamental legal rights in Australia* found 262 provisions which breach fundamental legal rights. That report focussed on the extent to which four such fundamental legal rights are abrogated in current acts of the federal parliament:

1. The presumption of innocence and burden of proof;
2. Natural justice;
3. The right to silence;
4. Privilege against self-incrimination.

An update to that research published in April 2016 found there had been a net increase in the number of breaches in federal legislation passed during the 2015 parliamentary year, to 290.

This update includes all legislation passed by the Commonwealth parliament in 2016. **In total, our research has uncovered 21 new provisions that breach fundamental legal rights in legislation passed in 2016. Just 4 were repealed.**

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Burden of proof	47	2	0	49
Natural justice	94	2	2	94
Right to silence	33	10	0	43
Privilege against self-incrimination	116	7	2	121
TOTAL	**290**	**21**	**4**	**307**

The continued failure of successive governments to maintain legal rights threatens the capacity of our legal system to produce just outcomes.

This report makes two recommendations:

1. All current provisions that breach fundamental legal rights must be repealed; and
2. Legislators of all political stripes should commit to a greater level of respect for the principles of the rule of law and refuse to pass laws that breach our fundamental legal rights.

1 Simon Breheny and Morgan Begg, 'The state of fundamental legal rights in Australia' (Occasional Paper, Institute of Public Affairs, 2014).

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Introduction

Fundamental legal rights are necessary to achieve justice within the legal system, and act as a vital constraint on the coercive power of the state. In 2014, the IPA's report, *The state of fundamental legal rights in Australia* (the "2014 report"), and an updated audit published in 2016 (the "2016 report") revealed the extent that fundamental legal rights – the burden of proof, natural justice, the right to silence and the privilege against self-incrimination – are undermined in current federal legislation.

This report builds on the 2014 and 2016 reports, by analysing the results of an audit of all legislation passed in 2016.

The list of legal rights breaches found in the 2014 report and the 2016 report have also been audited to determine which breaches have since been repealed. From this, we have developed a net 2016 figure for legal rights breaches, and an updated total of legal rights breaches in current federal legislation up to the end of 2016.

The results can be observed in the table below:

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Burden of proof	47	2	0	49
Natural justice	94	2	2	94
Right to silence	33	10	0	43
Privilege against self-incrimination	116	7	2	121
TOTAL	**290**	**21**	**4**	**307**

This report is divided into five main chapters. the first four cover the state of each of the above-mentioned legal rights separately. The fifth presents a total picture of the state of legal rights in Australia, including an analysis of the areas which are more affected by laws which affect legal rights.

Each section also includes charts which show when current provisions that affect legal rights were introduced. This is discussed further on page 13.

The presumption of innocence and burden of proof

The burden of proof is a duty placed on the party that initiates legal proceedings to establish their case.[2] In 2014 we discussed why this is so important:

> Strict rules governing the burden of proof lie at the heart of any just legal system. This principle cannot be underestimated in its importance, as it supports the vital legal principle of the presumption of innocence.[3]

Difficulties associated with proving elements of an offence or civil remedy are not a sufficient justification for reversing the burden of proof. As we also outlined in 2014:

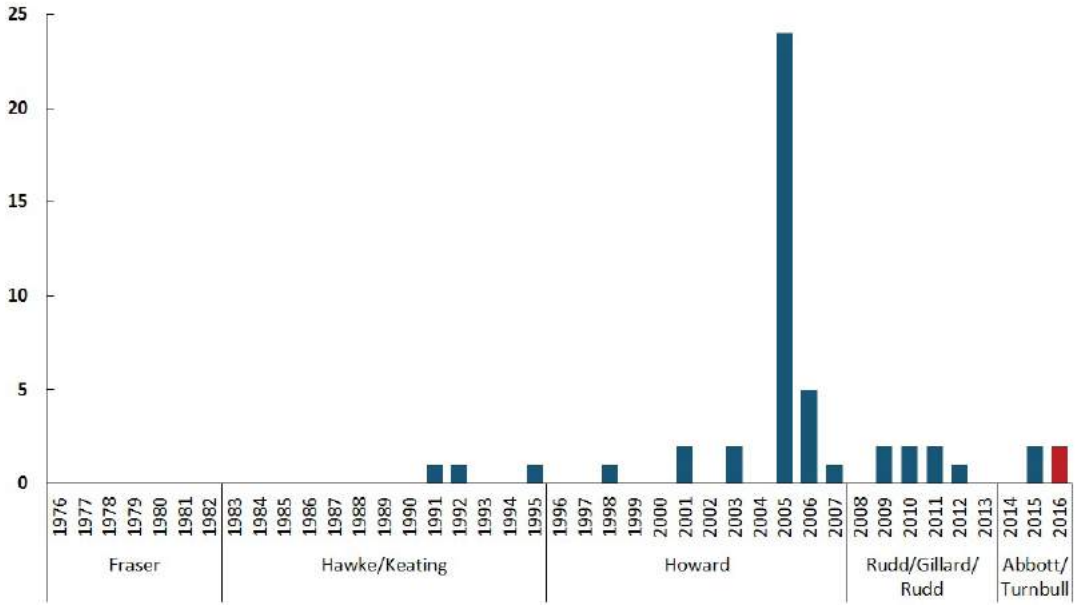
> The common law legal system is ideal not for the ease with which it allows for prosecution, but for the protections it offers against an overbearing state.[4]

Our research found that in 2016 two provisions were added to the 47 extant federal laws that reversed the onus of proof.

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Burden of proof	47	2	0	49

The chart below shows when all provisions that reverse the onus of proof, currently in federal legislation, were introduced. 2016 is highlighted in red.

Chart: Provisions reversing the burden of proof in current legislation, by year



Source: IPA

2 Albert Kiralfy, *The Burden of Proof* (Professional Books Ltd, 1987) 12.

3 Breheny and Begg, 5.

4 Breheny and Begg, 7.

Natural justice

The second category of legal rights we have analysed are the principles of natural justice. This encompasses procedural fairness and the right to judicial review. Of procedural fairness, the Australian Law Reform Commission noted in a 2015 report into traditional rights and freedoms that:

> A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness – a term often used interchangeably with natural justice – before a decision that affects them is made.[5]

Associated with this is the right to challenge administrative decisions in Australian courts:

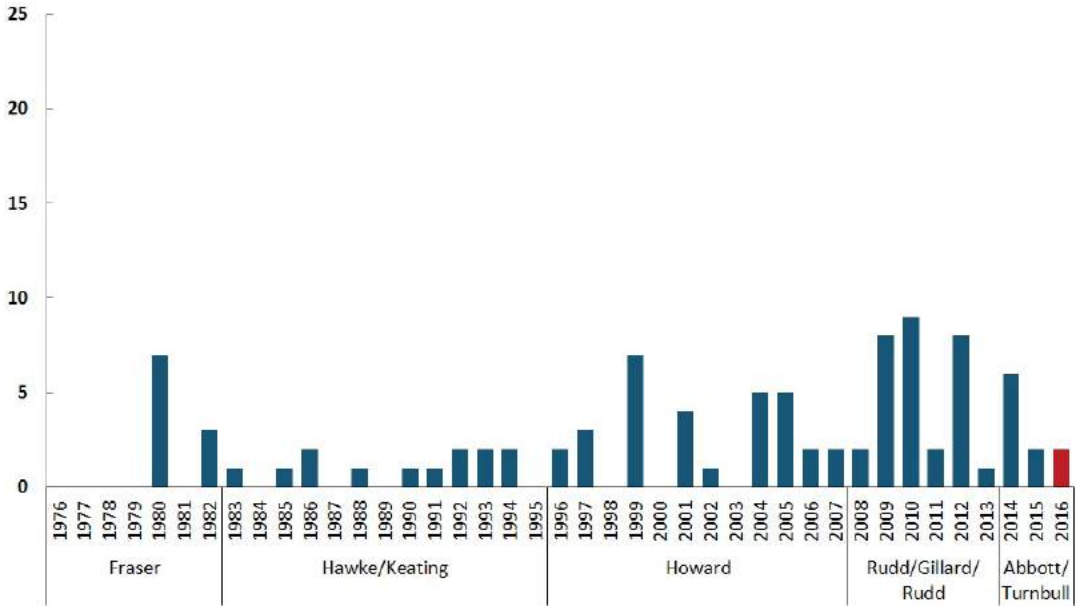
> Access to the courts to challenge administrative action is an important common law right. Judicial review of administrative action is about setting the boundaries of government power. It is about ensuring government officials obey the law and act within their prescribed powers.[6]

Our research has found that in 2016, two laws that limit the principles of natural justice were introduced, while two were repealed.

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Natural justice	94	2	2	94

The chart below shows when all provisions that limit the principles of natural justice, currently in federal legislation, were introduced. 2016 is highlighted in red.

Chart: Natural justice breaches in current law, by year



Source: IPA

5 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 391-2.

6 Ibid 413.

Right to silence

The third legal right we have researched is the right to silence. In 2014, we discussed its importance:

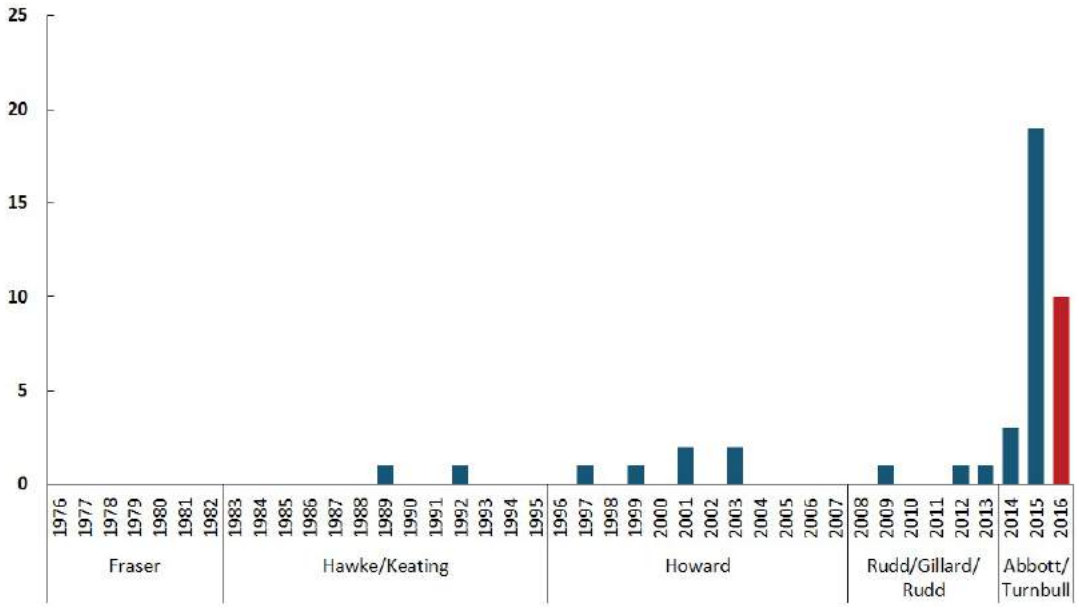
> The right to silence is a fundamental freedom that has been a feature of the common law for centuries. Just as with so many of our freedoms, this right is also under attack. The right to silence grants an accused the ability to refuse to comment on any allegations and accusations. Just as with the burden of proof, the onus is on the prosecution to establish your guilt and produce any testimony or evidence that establishes that fact.[7]

Our research has found 12 provisions that remove the right to silence were added in 2016.

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Right to silence	33	10	0	43

Below is a chart displaying when each current provision that removes the right to silence in federal legislation was introduced. 2016 is highlighted in red.

Chart: Right to silence breaches in current legislation, by year



Source: IPA

7 Breheny & Begg (2014) 18.

The privilege against self-incrimination

The privilege against self-incrimination is a right that evolved from the right to silence, but is also a fundamental freedom in its own right. More than a mere rule of evidence, it is deeply engrained in the common law.[8] The Australian Law Reform Commission summarised the privilege in 2015:

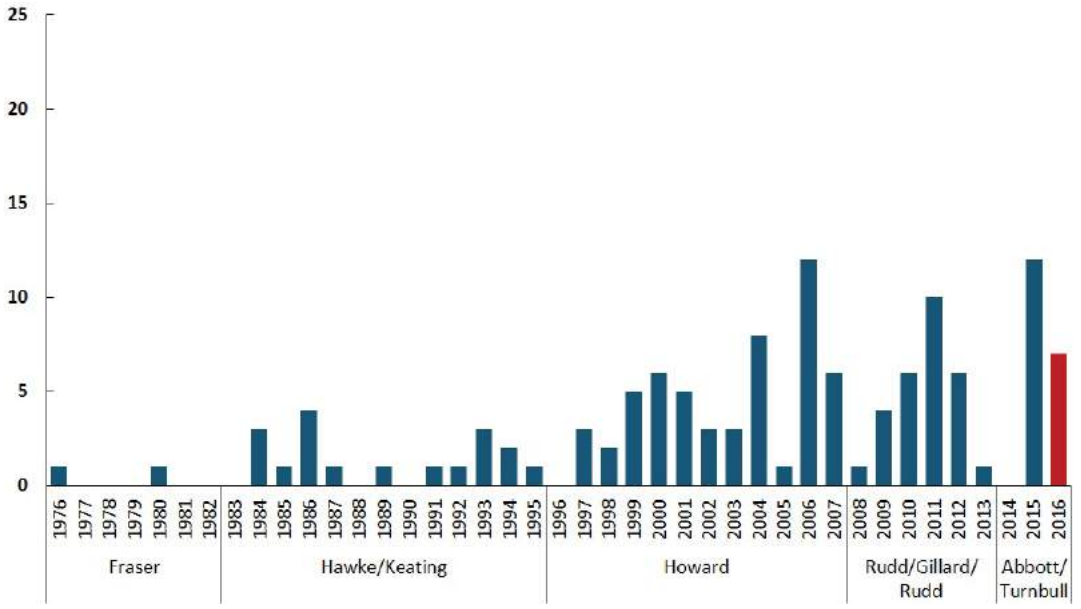
> The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. Many Commonwealth statutes provide coercive information-gathering and investigation powers to Commonwealth agencies, and many of these statutes abrogate the privilege against self-incrimination.[9]

According to our research, the federal parliament introduced seven provisions that restricted the privilege against self-incrimination in 2016. During that period, one provision restricting the privilege was removed from the statute books, leading to a net increase of six breaches.

Legal right	Breaches at end of 2015	Breaches added in 2016	Breaches repealed	Breaches at end of 2016
Privilege against self-incrimination	116	7	2	121

Below is a chart which displays when each current provision that restricts the privilege against self-incrimination was introduced. 2016 is highlighted in red.

Chart: Privilege against self-incrimination breaches in current legislation, by year



Source: IPA

8 *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

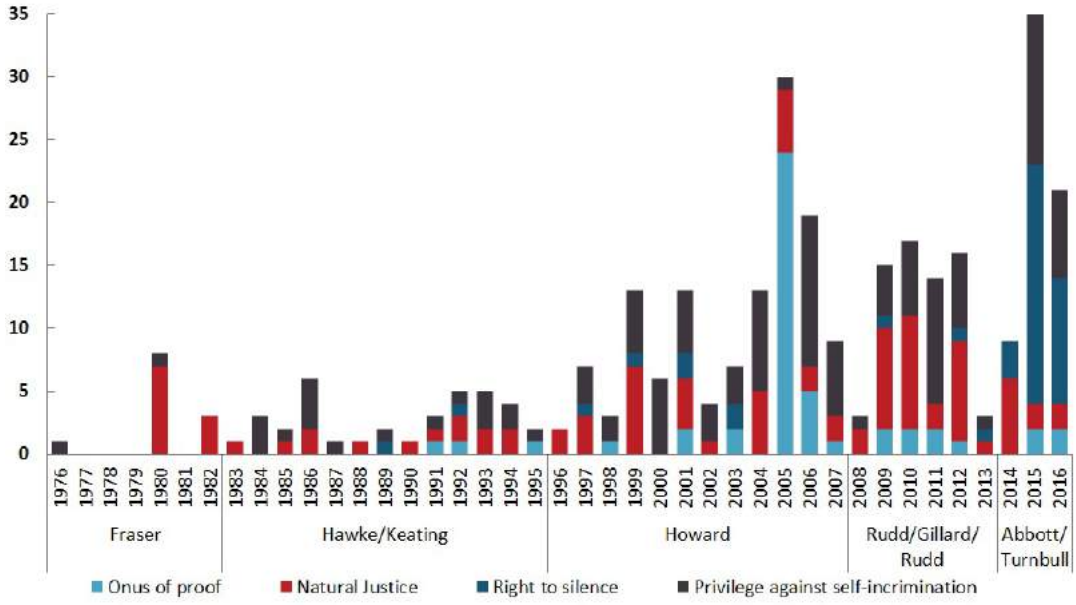
9 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 18.

Legal rights breaches by year and policy area

This report intends to do two things: to analyse what legislative changes occurred in 2016 that impacted on legal rights, and to create a snapshot of total legal rights breaches at the end of 2016.

The graph below is a representation of the years in which legal rights breaches contained in current federal acts were enacted, up to and including 2016. It also highlights the government that was in power at the time of each of those breaches.

Chart: Legal rights breaches in current legislation, by year



Source: IPA

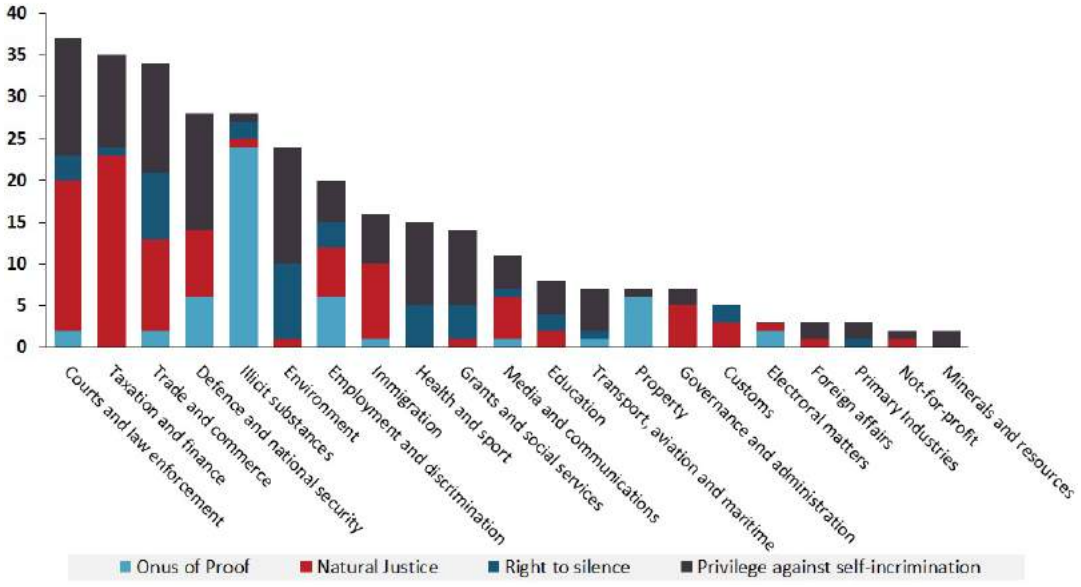
In 2016, provisions undermining fundamental legal rights were most prevalent in the areas of illicit substances, employment and discrimination, and social services:

Category	2015 breaches	Net change in 2016	Total
Courts and law enforcement	37	0	37
Taxation and finance	34	+ 1	35
Trade and commerce	34	0	34
Defence and national security	28	0	28
Illicit substances	24	+4	28
Environment	24	0	24

Employment and discrimination	15	+5	20
Immigration	16	0	16
Health and sport	16	-1	15
Grants and social services	6	+8	14
Media and communication	11	0	11
Education	6	+2	8
Transport, aviation and maritime	8	-1	7
Property	7	0	7
Governance & administration	7	0	7
Customs	6	-1	5
Electoral matters	3	0	3
Foreign Affairs	3	0	3
Primary industries	3	0	3
Not for profits	2	0	2
Minerals & resources	2	0	2

The chart below represents these categories as they stand at the end of 2016.

Chart: Legal rights breaches in current legislation, by category



Source: IPA

The 'snapshot' explained

The chart in the previous section outlines which governments were responsible for introducing legislation that affect legal rights in current legislation only. While the data appears to indicate an upward trend, we explained in our 2014 report that this is not necessarily proof of such:

> Our research ... highlights the year in which current legal rights breaches were passed. In terms of the government that was in power at the time these provisions were made law, this can be understood as that government's legacy of legal rights breaches as the law stands today.[10]

The upward trend may in part be attributable to the natural process of legislative renewal. Over time, laws are redrawn, which involves the rewriting of existing law with provisions that in substance are very similar.

For instance, the federal government introduced the *Fair Work (Registered Organisations) Amendment Act* in 2016 which had the effect of repealing section 337AA from the *Fair Work (Registered Organisations) Act 2009*, a provision we identified in our 2014 report as abrogating the privilege against self-incrimination. However, the 2016 amendments insert section 337AD to the *Fair Work (Registered Organisations) Act*, which we have identified in this report as also affecting the privilege against self-incrimination.

In this event, only the most recent law would be included in our snapshot. When this occurs, this can be seen as a failure of more recent governments to restore fundamental legal rights by failing to remove them altogether in the legislative process.

Conclusion

The IPA's series of reports, beginning in 2014, demonstrate that traditional legal rights are being persistently undermined in federal legislation. This report demonstrates that while the rate of increase in legal rights breaches has slowed, the problem is still getting worse.

This update, as well as our previous reports, also provides the authoritative blueprint for reform, highlighting precisely where the problem areas are, and how the situation can be remedied.

In order to protect our liberties and to achieve just outcomes, we must be vigilant in safeguarding these rights. The extent to which basic legal rights are being eroded poses a significant threat to the rule of law in Australia.

The government should commit to rectifying this.

10 Breheny & Begg (2014) 29.

Appendix 1 – Presumption of innocence/ burden of proof breaches in 2016 legislation

Legislation	Key word(s) searched	Relevant section	Minister responsible	Category
Fair Work (Registered Organisations) Amendment Act 2016 (Cth)	"bears a legal burden"	Amends the *Fair Work (Registered Organisations) Act 2009* to include section 337AC(2)	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	It is a defence to a prosecution for the offence of concealing, destroying, mutilating or altering documents relevant to an investigation, if it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part. The defendant bears a legal burden in relation to satisfying this defence.			
Building and Construction Industry (Improving Productivity) Act 2016 (Cth)	"presumed"	Section 57 Reason for action to be presumed unless proved otherwise	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	If in an application in relation to unlawful picketing or a civil remedy provision under chapter 6 of part 2 of the Act, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and taking that action for that reason or with that intent would constitute a contravention of the section or provision; it is presumed, in proceedings arising from the application that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.			
Total number of Acts	**2**	***Total number of provisions***	**2**	

Appendix 2 – Natural justice breaches in 2016 legislation

Legislation	Key word(s) searched	Relevant section	Minister responsible	Category
Narcotics Drugs Legislation Amendment 2016 (Cth)	"Natural justice"	Amended the *Narcotics Drugs Act 1987* to include section 21A	Sussan Ley MP Minister for Health and Aged Care	Illicit substances
Description	If the natural justice hearing rule would, but for the provisions of this Act, require the disclosure of information identified as sensitive law enforcement information under the Act, the Act is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the disclosure of that information.			
Treasury Laws Amendment (Fair and Sustainable Superannuation) Act (Cth)		Amended the *Administrative Decisions (Judicial Review) Act 1977*	Senator Mitchell Fifield Assistant Minister for Social Services	Taxation and finance
Description	Amends the ADJR to include decisions of the Commissioner of Taxation made under subdivision 126-A in Schedule 1 of the *Taxation Administration Act 1953* on the list of those excluded form judicial review.			
Total number of Acts	**2**	***Total number of provisions***	**2**	

Appendix 3 – Right to silence breaches in 2016 legislation

Legislation	Key word(s) searched	Relevant section	Minister responsible	Category
VET Student Loans Act 2016 (Cth)	"fails to comply"	Section 52(4)-(5) Ongoing information requirements	Karen Andrews MP Asst Minister for Vocational Education and Skills	Education
Description	Approved course providers are subject to civil and criminal penalties if the provider fails to comply with ongoing information requirements.			
	"fails to comply"	Section 53(4)-(5) Ongoing information requirements	Karen Andrews MP Asst Minister for Vocational Education and Skills	Education
Description	An approved course provider contravenes this subsection if the provider fails to comply with a notice from the Secretary requestion certain information or documents.			
Building and Construction Industry (Improving Productivity) Act 2016	"fails to comply"	Section 62 Offence for failing to comply with examination notice	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	A person commits an offence if the person has been given an examination notice and fails to (a) give information or produce a document on accordance with the notice, or (b) to attend to answer questions in accordance with the notice or (d) to answer questions relevant to the investigation as required by the examination notice.			
	"fails to comply"	Section 77 Power to require persons to produce records or document	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	An authorised officer may require a person, A person must comply with a written notice served on that person by an authorised officer to produce a record or document to the authorised officer.			
Budget Savings (Omnibus) Act 2016	"fails to comply"	Amends the *A New Tax System (Family Assistance) (Administration) Act 1999* by inserting section 1025	Scott Morrison MP Treasurer	Grants and social services
Description	It is an offence if a person fails to comply with a requirement to answer questions or produce documents to an officer for the purposes of determining whether a "departure prohibition order" is in force and whether the person's departure is authorised by a departure authorisation certificate.			
	"fails to comply"	Amends the *Paid Parental Leave Act 2010* to include section 200S	Scott Morrison MP Treasurer	Grants and social services
Description	It is an if a person fails to comply with a requirement to answer questions or produce documents to an officer for the purposes of working out whether a "departure prohibition order" is in force and if such an order is in force in respect of that person, whether the person's departure is authorised by a departure authorisation certificate.			
	"fails to comply"	Amends the *Social Security Act 1991* to include section 1256	Scott Morrison MP Treasurer	Grants and social services
Description	It is an offence if a person fails to comply with a requirement to answer questions or produce documents to an officer for the purposes of working out whether a "departure prohibition order" is in force and if such an order is in force, whether the person's departure is authorised by a departure authorisation certificate.			

		"fails to comply"	Amends the *Student Assistance Act 1973* so that it now includes section 43Y	Scott Morrison MP Treasurer	Grants and social services
	Description	It is an offence if a person fails to comply with a requirement to answer questions or produce documents to an officer for the purposes of working out whether a "departure prohibition order" is in force and if such an order is in force, whether the person's departure is authorised by a departure authorisation certificate.			
Narcotic Drugs Amendment Act 2016 (Cth)		"fail to comply"	Amends section 14F of the *Narcotics Drugs Act 1973*	Sussan Ley MP Minister for Health and Aged Care	Illicit substances
	Description	The occupier of premises being inspected in accordance with s 14C must provide the inspector with all reasonable facilities and assistance for the effective exercise of their powers while on the premises. A failure to comply is a strict liability offence.			
		"failure to give information"	Amends section 14M of the *Narcotics Drugs Act 1973*	Sussan Ley MP Minister for Health and Aged Care	Illicit substances
	Description	The Secretary may require further information or documents from an applicant for a licence or a permit under the Act. A failure to give information or documents with a specified period is an offence.			
Total number of Acts		***4***	***Total number of provisions***	***10***	

Appendix 4 – Privilege against self-incrimination breaches in 2016 legislation

Legislation	Key word(s) searched	Relevant section	Minister responsible	Category
Building and Construction Industry (Improving Productivity) Act 2016 (Cth)	"self-incrimination"	Section 102 Self-incrimination	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	A person is not excused from giving information under an examination notice or under sections 74(1)(d) and 77(1) on the grounds that to do so might tend to incrimination the person or otherwise expose the person to a penalty or other liability.			
Fair Work (Registered Organisations) Amendment Act 2016 (Cth)	"self-incrimination"	Amends the *Fair Work (Registered Organisations) Act 2009* to include section 337AD	Malcolm Turnbull MP Prime Minister	Employment and discrimination
Description	It is not a reasonable excuse for a person to refuse or fail to give information, produce a document or sign a record in accordance with a requirement made of the person, on the grounds that the information, producing or signing the record might tend to incriminate the person or make the person liable to a penalty.			
Budget Savings (Omnibus) Act 2016 (Cth)	"self-incrimination"	Amends the A New Tax System (Family Assistance) (Administration) Act 1999 to include section 102T	Scott Morrison MP Treasurer	Grants and social services
Description	An individual is not excused from answering a question, or producing a document on the ground that the answer to the question might tend to incriminate the individual or expose the individual to a penalty.			
	"self-incrimination"	Amends the *Paid Parental Leave Act 2010* to include section 200T	Scott Morrison MP Treasurer	Grants and social services
Description	An individual is not excused from answering a question, or producing a document on the ground that the answer to the question might tend to incriminate the individual or expose the individual to a penalty.			
	"self-incrimination"	Amends the *Social Security Act 1991* to include section 1257	Scott Morrison MP Treasurer	Grants and social services
Description	An individual is not excused from answering a question, or producing a document on the ground that the answer to the question might tend to incriminate the individual or expose the individual to a penalty.			
	"self-incrimination"	Amends the *Student Assistance Act 1973* to include section 43Z	Scott Morrison MP Treasurer	Grants and social services
Description	An individual is not excused from answering a question, or producing a document on the ground that the answer to the question might tend to incriminate the individual or expose the individual to a penalty.			
Narcotic Drugs Amendment Act 2016 (Cth)	"self-incrimination"	Amends section 24B of the *Narcotic Drugs Act 1967*	Sussan Ley MP Minister of Health and Aged Care	Illicit substances
Description	A person is not excused from giving information under the Act on the ground that the information might tend to incriminate the person or expose the person to a penalty.			
Number of Acts	***4***	***Number of provisions***	***7***	

Appendix 5 – Amendments and repeals in 2016

Legislation	Legal right breached	Relevant section	Date introduced	Category
National Health Reform Act 2011 (Cth)	Natural justice	Section 62 Additional provisions about reports	14 October 2011	Health and sport
	Provision repealed by schedule 7 of the *Budget Savings (Omnibus) Act 2016*, which commenced 1 November 2016.			
Fair Work (Registered Organisations) Act 2009	Privilege against self-incrimination	Section 337AA Additional power to require information etc. – civil penalty provisions	29 June 2012	Employment and discrimination
	Provision repealed by the *Fair Work (Registered Organisations) Amendment Act 2016*, which has not yet commenced. It will be substantially replaced by the new self-incrimination provision, section 337AD.			
Road Safety Remuneration Tribunal Act 2012	Natural justice		16 April 2012	Transport, aviation and maritime
	Previously decisions of the Road Safety Remuneration Tribunal were excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. The *Road Safety Remuneration Repeal Act 2016* removed the relevant provision in the ADJR Act was also repealed. This commenced 21 April 2016.			
Quarantine Act 1908	Privilege against self-incrimination	Section 79A Exclusion of privilege against self-incrimination in certain circumstances	23 December 1999	Customs
	The whole of the *Quarantine Act 1908* was repealed by schedule 1 of the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015*, which commenced 16 June 2016.			
Total number of Acts	***4***	***Total number of provisions***	***4***	

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