

# It can be hard to challenge workplace discrimination, but Australian government's new bill should make it easier

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Credit: Ron Lach from Pexels

Alex Gutierrez worked for MUR Shipping and its predecessors for nearly 30 years. But in 2018 he was told, in line with company policy, it

was time to set a retirement date.

Gutierrez was moved to a fixed-term contract, asked to train his replacement and ultimately resigned from his job. He then complained to the Australian Human Rights Commission and brought his claim to court, alleging [age discrimination](#).

He won the case but he also lost.

The [court found](#) the company had discriminated. But Gutierrez's damages—A\$20,000—dwarfed his legal [costs](#), which amounted to [about \\$150,000](#). The low damages also meant Gutierrez might have to pay MUR's costs, as the damages were lower than a previous settlement offer.

Gutierrez was the first person to win an age [discrimination](#) case in court in the roughly 20 years the federal Age Discrimination Act 2004 has existed and his situation explains why. You can win in court but still be hugely out of pocket for your costs and your employer's costs. Few people take the risk.

That problem will be largely eliminated under a new government bill before the federal parliament. The [bill](#) would introduce a modified "equal access" cost protection provision for discrimination claims.

## **How changing the law would help**

If the bill passes, claimants (workers) will generally recover their costs when their claim is successful. Respondents (employers) cannot generally recover their costs, except in limited circumstances. This could significantly increase the number of workers who are willing to sue over discrimination, of any kind.

Discrimination at work is common: in one [survey](#) conducted for the Australian Human Rights Commission, 63% of respondents said they had experienced age discrimination—being considered too young, or too old—in the last five years.

But few people challenge discrimination in the workplace. In [my research](#) on age discrimination law, I found people were often concerned about the costs of making a complaint. This includes [financial costs](#), but also personal and emotional costs. People were also worried about the time it might take to resolve.

Costs have been a particular problem under federal discrimination law.

Australia has discrimination laws at state, territory and federal level. Discrimination is also banned under industrial law—the federal Fair Work Act 2009. In every jurisdiction except Victoria, a complaint is first made to a statutory equality agency, which tries conciliation.

In many cases, this succeeds and most claims are resolved, though many are withdrawn.

## **Conciliation can save time and money**

Conciliation is comparatively quick and cheap and lawyers are often not involved because you can represent yourself.

It is when a complaint isn't resolved at conciliation that the costs increase. In the states and territories, and under the federal Fair Work Act 2009, parties mostly pay their own costs (that is, the cost of a lawyer).

It is different under federal discrimination law. In the federal courts, the losing party generally pays the winning party's costs. This makes the

stakes of a discrimination claim incredibly high: if your claim fails, you may not just have to pay your own legal bill, but also the other side's legal bill.

The perils of costs were shown by Gutierrez's case. In [Gutierrez v MUR Shipping Australia Pty Limited](#), despite winning his claim of age discrimination, Gutierrez had to appeal in order to escape punishing legal costs.

Fortunately, Gutierrez had his [appeal upheld](#); his damages were increased to \$232,215, so he was no longer liable for the other side's costs, and he had his appeal costs paid. But not every claim under the current law will be so lucky.

## **Prohibitive costs can stop people from taking action**

Costs make challenging discrimination at work under federal law much more difficult. The human rights commission's [Respect@Work report](#) found the risk of a costs order was a significant "disincentive" to bringing a claim under federal law.

The new bill might remove this disincentive by re-balancing the costs of claiming, enabling many more people to challenge discrimination in the federal courts.

We all have an interest in challenging discrimination and inequality. Research suggests more equal societies are [happier](#) and [healthier](#) overall. There is a good chance, too, many of us will experience some form of discrimination in our working lives.

Using discrimination law—making a complaint—can benefit us as individuals but can also force broader change. It can lead to policy change and it can force employers to take equality seriously.

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