IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 9**

	Reference No. HRRT 053/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**CURTIS ANTONY NIXON**
	PLAINTIFF
AND	**ATTORNEY-GENERAL ON BEHALF OF THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms MA Roche, Co-Chairperson
Ms GJ Goodwin, Member
Ms K Anderson, Member

REPRESENTATION:
Mr CA Nixon in person
Ms HM Carrad for defendant

DATE OF HEARING: **6 and 7 November 2017**

DATE OF DECISION: **28 March 2018**

DECISION OF TRIBUNAL[1]

Introduction

[1] Mr Nixon is the father of an 11-year-old daughter. He shares the care and expenses of his daughter equally with her mother, Lori Coles, his former partner. Ms Coles receives a sole parent support benefit which takes the daughter into account as a dependent child. Mr Nixon receives a supported living payment benefit which does not take the daughter into account as his dependent.

[1] [This decision is to be cited as *Nixon v Attorney-General* [2018] NZHRRT 9.]

[2] Section 70B of the Social Security Act 1964 (the SSA) is the mechanism by which it is determined which of the separated parents, who are both beneficiaries and who share care for a dependent child, is eligible to receive a sole parent support benefit. Section 70B provides that in shared care situations, only the parent whom the chief executive determines has the greater responsibility for the child, shall be entitled to have that child taken into account in assessing that parent's entitlement to a benefit and the rate of benefit payable.

[3] When neither parent can be identified as having the greater responsibility for the child, s 70B(3) provides that only the parent whom the chief executive ascertains was the principle caregiver immediately before the parents began living apart shall be entitled to have that child taken into account when assessing their benefit.

[4] Mr Nixon contends that s 70B(3) favours mothers and that he is indirectly discriminated against on the ground of sex because women are more likely than men to be the principal caregivers of children prior to a separation. He says that this is because from birth, until the age of approximately 18 months, most of a child's care will be provided by the mother as a "biological necessity" because of breastfeeding. Mr Nixon claims that s 70B(3) indirectly discriminates against him as a male because, as such, he cannot conceive, give birth to, or breastfeed a child.

[5] Mr Nixon complains that s 70B(3) of the SSA breaches Part 1A of the Human Rights Act 1993 (HRA). Accordingly, he seeks a declaration pursuant to s 92J of the HRA that s 70B(3) is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 (BORA).

[6] The Crown opposes Mr Nixon's application. It submits it is not established why giving birth and the ability to breastfeed means that it is a biological necessity that the mother is the primary caregiver when a child is aged 18 months or under, or why the s 70B(3) test of primary responsibility pre-separation reflects gender, rather than parental choice about family responsibilities. It submits that the section is not discriminatory as it does not specify any gender dependent factors for deciding who was the principle caregiver immediately prior to separation. Rather, this depends on arrangements made by the parents themselves.

[7] In addition, the Crown submits that Mr Nixon's claim regarding the discriminatory effect of s 70B(3) on himself must fail because he has never applied for a sole parent benefit and accordingly has never been the subject of an assessment under s 70B(3).

Statutory framework

[8] Section 70B of the SSA provides:

> **70B Entitlement to benefits in cases of shared custody**
>
> (1) If the parents of a dependent child—
> (a) are living apart; and
> (b) are both beneficiaries; and
> (c) each has the primary responsibility for the care of that child for at least 40% of the time—

only the parent whom the chief executive is satisfied has the greater responsibility for the child shall be entitled to have that child taken into account by the chief executive in assessing that parent's entitlement to a benefit and the rate of benefit payable at any one time.

(2) In deciding which parent has the greater responsibility for the child, the chief executive shall have regard primarily to the periods the child is in the care of each parent and then to the following factors:
   (a) how the responsibility for decisions about the daily activities of the child is shared; and
   (b) who is responsible for taking the child to and from school and supervising that child's leisure activities; and
   (c) how decisions about the education or health care of the child are made; and
   (d) the financial arrangements for the child's material support; and
   (e) which parent pays for which expenses of the child.

(3) If the chief executive is unable to ascertain that one parent has the greater responsibility for the child than the other, only the parent whom the chief executive ascertains was the principal caregiver in respect of the child immediately before the parents began living apart shall be entitled to have that child taken into account by the chief executive in assessing that parent's entitlement to a benefit and the rate of benefit payable.

(4) If the chief executive is unable to ascertain which of the parents has the greater responsibility for the child or which of them was the principal caregiver before the parents began living apart, the parents shall agree between themselves as to which of them shall be entitled to have that child taken into account by the chief executive in assessing entitlement to a benefit and the rate of benefit payable; and until the parents reach agreement the child shall not be taken into account in assessing the entitlement to a benefit of, or the rate of benefit payable to, either parent.

[9] As is obvious from the above section:

[9.1] Only one of the two separated parents who are both receiving benefits can receive the sole parent benefit.

[9.2] The chief executive is required to determine which parent has greater responsibility to the child, based on factors in existence at the time of a relevant application for the benefit (s 70B(2)).

[9.3] Only where the chief executive cannot ascertain that one of the two parents has greater responsibility using the "contemporary" approach, is the chief executive required to adopt a retrospective approach. He or she then does so by making an assessment as at the time immediately before the parents began living apart.

[9.4] Where the application of the retrospective (historic) approach under s 70B(3) does not deliver a conclusion, the parents are required to agree which of them is to receive the benefit. Until they so agree, neither parent can be paid the sole parent benefit.

Human Rights Act Part 1A

[10] As set out in s 20I of the HRA, the statutorily stated purpose of Part 1A of the HRA is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by s 19 of BORA, is in breach of Part 1A if the act or omission is that of a person or body referred to in s 3 of BORA, namely:

[10.1] The legislative, executive, or judicial branch of the Government of New Zealand; or

[10.2] A person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[11] Under s 20L of the HRA, such inconsistency is established if the act or omission:

[11.1] Limits the right to freedom from discrimination on a prohibited ground (here, sex); and

[11.2] Is not, under s 5 of BORA, a justified limitation on that right.

Issues to be determined

[12] In his statement of claim, Mr Nixon stated his complaint was about "discrimination by Government" and specified the relevant provision of the HRA was s 20J(1)(a). He also specified the complaint concerned, "the executive branch of the government of New Zealand". Although complaining about legislation, there was no specific allegation in the claim form that that the act or omission complained of was an act or omission of the legislative branch. However, as s 20J(1)(a) refers to both the executive and the legislative branches, and as this matter (as well as the executive action) was addressed at the hearing, the Tribunal has likewise addressed the issue of whether the legislation is discriminatory in its decision.

[13] The following issues therefore require determination:

[13.1] In the absence of an application by Mr Nixon for sole parent benefit, pursuant to s 70B of the SSA, is there an act or omission of the executive branch of government that directly or indirectly discriminates against Mr Nixon?

[13.2] Is s 70B(3) of the SSA an act or omission of the legislative branch of government that directly or indirectly discriminates against Mr Nixon or in respect of beneficiary fathers generally?

[13.3] If the answer to [13.2] is in the affirmative, is s 70B(3) a justified limitation on that right?

Evidence

[14] At the hearing, Mr Nixon gave evidence on his own behalf. Two Ministry of Social Development (MSD) employees, Karen McKenzie and Bede Hogan, gave evidence on behalf of the Crown. A summary of the evidence given follows:

Evidence of Mr Nixon

[15] Mr Nixon and Ms Coles began a relationship about a year prior to their daughter's birth in July 2005. Prior to the birth, Ms Coles worked as a social worker and Mr Nixon worked as a postie although he ceased this employment shortly before the birth because he had a back injury.

[16] Following their daughter's birth, Ms Coles was on maternity leave while Mr Nixon worked at the Turners and Growers Flower Market for 15 hours per week and began a graphic design course. Ms Coles breastfed the daughter. Mr Nixon was also actively involved in her care. He bathed her, changed her, played with her and fed her solids when this became appropriate.

[17] Some time after 1 February 2006, when the daughter was approximately six months old, Mr Nixon and Ms Coles separated.

[18] After his separation from Ms Coles, Mr Nixon moved into a student hostel and became what he described as a "weekend and holiday Dad". Ms Coles had day to day care of the daughter and, sometime after the separation, began to receive a domestic purposes benefit pursuant to s 20 of the SSA.

[19] The daughter remained in the day to day care of Ms Coles even after breastfeeding ceased around Christmas 2006.

[20] In late 2007, when the daughter was aged between two and two and a half, Mr Nixon and Ms Coles agreed to change the care arrangements for her so that she would spend half her time with each of them. Initially, the daughter spent alternating periods of three and four days with each parent which was later changed to a "week about" arrangement. Mr Nixon and Ms Coles also agreed to equally share the costs of the daughter.

[21] After the shared care arrangement began, Ms Coles remained on the domestic purposes benefit (now called the sole parent support benefit). She remains on this benefit still although she has recently begun to work part-time as a school social worker.

[22] Mr Nixon was also on a WINZ benefit when he commenced the half time care of his daughter. Sometime after the shared care arrangement began, he made an enquiry at a WINZ office about getting a sole parent benefit to reflect the costs associated with his half time care of his daughter. He was told that he was ineligible for a sole parent benefit because Ms Coles was already on it. Accordingly, he did not apply.

[23] In 2009 Mr Nixon commenced employment at Land Information New Zealand (LINZ). Although he started working at LINZ only 20 hours a week, his employment eventually increased to full-time. His daughter remained in his care for half the time. Mr Nixon used crèches, baby-sitters, and other facilities to assist with her care when he was working.

[24] In late 2011 Mr Nixon left his employment at LINZ for health reasons. He reapplied for a benefit and was given a sickness benefit, although was later transferred to a job seeker benefit. He has remained on a benefit since that time. From time to time Mr Nixon has been able to obtain short term casual work and during these periods of employment has had his benefit abated. He is currently on an invalid's benefit. Mr Nixon and Ms Coles receive in-work tax credits from the Department of Inland Revenue in respect of their daughter. Inland Revenue apportions this tax credit equally between them.

[25] Mr Nixon has experienced financial hardship arising from the costs associated with maintaining himself and his daughter as well as paying his half share of expenses such as school fees and tuition fees. He has had to be creative in managing these financial

challenges. For example, he spends food money on tuition and then seeks an emergency grant for food. He also uses food banks and receives food parcels. At the time of the hearing he had recently obtained a Variety Club grant to cover the cost of his daughter's dancing tuition. Ms Coles occasionally provides Mr Nixon with gifts of food and bears the sole cost of transporting the daughter to, and paying for the services of, an alternative health practitioner she uses for the daughter.

[26] Mr Nixon has calculated that the difference between the benefit payment he receives and the sole parent support benefit is $77.62. He has made an application to WINZ for an emergency benefit to cover this difference. Emergency benefit is the mechanism by which parents in split care arrangements (where each parent has full-time care of one or more children of a relationship) are paid to reflect their child care responsibilities. At the time of the hearing, Mr Nixon had not had an outcome from his emergency benefit application and suspected that WINZ was awaiting the outcome of this case.

[27] Following the advice he received from WINZ after the shared care arrangement began, Mr Nixon has never made an application for a sole parent support benefit. There has therefore never been an assessment under s 70B(1) of the SSA. Mr Nixon believes that because of s 70B(3), any application under s 70B(1) would be unsuccessful. Accordingly, an assessment under s 70B(3) has never been made in respect of him. Instead, he has directed his efforts into campaigning to have the section, which he considers to be discriminatory, changed. These efforts have included letters to Ministers, a petition to Parliament and the complaint to the Human Rights Commission pursuant to Part 1A of the Human Rights Act 1993 which gave rise to these proceedings.

[28] In his view, it is "proper" for children under the age of two to be in the care of their mothers because "breast is best" and having mothers as primary caregivers is desirable and normal. In his evidence, Mr Nixon noted the existence of institutional arrangements that support the breast feeding of young children such as mother with babies units in women's prisons.

[29] Mr Nixon argues that s 70B(3) of the SSA is discriminatory because it is both a biological necessity and a societal norm for young children to be primarily in the care of their mother. A regime which grants a benefit in respect of a child to their parent who was principal caregiver prior to separation is discriminatory as this person is likely to be the mother. He considers that the portion of the sole parent benefit which reflects the cost of maintaining a dependent child should be apportioned equally between parents who are beneficiaries when they share equal care of the child. It is not his view that in shared care arrangements such as his, two sole parent support benefits should be paid.

Evidence of Karen Jane McKenzie

[30] Karen McKenzie is a National Manager, Operational Support, at MSD. Ms McKenzie gave evidence concerning the application process for applying for a benefit which reflects primary responsibility for a dependent child and how s 70B(3) is applied by MSD.

[31] Applicants for sole parent support benefit under s 20D of the SSA are required to meet residential and age requirements, to not be living with a spouse or partner and must

be caring for a dependent child or children under the age of 14. A dependent child is defined in the SSA as a child who is primarily the responsibility of the person, maintained as a member of that family, and is financially dependent on that person.

[32] The application form for sole parent support benefit contains a question asking whether the applicant shares custody. If an applicant answers "Yes", the case manager will be alerted to the need to consider and discuss the childcare arrangements to make sure the applicant is a person eligible to receive a benefit at a rate which includes a dependent child.

[33] Sometimes in cases of shared care, the case manager's decision is challenged by the other parent, or, both parents apply for a benefit at a rate providing for care of a dependent child. In those cases, s 70B sets out a stepped-down framework for deciding which parent shall be entitled to have the child taken into account in assessing the parent's entitlements. Section 70B(2) requires the case manager to have regard primarily to the periods the child is in the care of each parent and then to the factors listed in the section. MSD "Decision guidelines for shared custody" provide:

> Where parents have equal time, to help you decide which parent has greater responsibility, consider the following:
> - Who pays for the child's material support (furniture, clothes, etc);
> - Who decides about the child's daily activities;
> - Who takes them to and from school and supervises leisure activities;
> - Who makes decisions about their education and health;
> - Who pays for which expenses.

[34] The guidelines then provide that:

> If it is not clear who has greater responsibility or the parents share the responsibility equally, the parent who was mainly responsible for the day to day care of the child prior to the separation is the person who can have the child included.

[35] The guidelines reflect the definition of "principal caregiver" in s 3 of the SSA which states:

> Principal caregiver, in relation to a dependent child, means the person who, in the opinion of the chief executive, has the primary responsibility for the day to day care of the child, other than on a temporary basis …

[36] Both s 70B and the guidelines for its operation are written in gender neutral terms. Accordingly, there is no mention of giving birth or breastfeeding as factors for decision-making in any aspect of the guidelines. In a similar way, there is no reference to other aspects of day to day care such as responsibility for bathing the child or putting the child to bed. The purpose of the guidelines is to assist case managers to identify which parent has greater responsibility for a child, and, if neither exercise greater responsibility, which parent had primary responsibility for childcare immediately before separation. Case managers separately interview each parent and are trained to ask open questions to obtain information. The information provided by one parent is discussed with the other parent and sometimes each parent is interviewed more than once to check details and to gain an accurate understanding of arrangements.

[37] If a case manager cannot reach a decision under s 70B(3), then the parents themselves need to agree who will receive the benefit at the child-related rate pursuant to s 70B(4). The guidelines provide:

> If a decision can't be made on who is entitled to have the child included, the parents must make the decision. Don't include the child in any income support until they have decided.

[38] The MSD does not hold any statistics concerning the relative numbers of men and women who receive the benefit of s 70B(3) because records are not kept about whether benefit entitlement has been granted following its application.

[39] In 2012, the Social Services Select Committee considered a petition from Mr Nixon regarding s 70B(3) of the Act. As part of the MSD response to that petition, MSD attempted to assess the number of beneficiaries who had shared care arrangements. The report advised: "Using the raw data we have available it would appear that, as at 30 June 2012, we had 53 ex-partners (of working age) identified as sharing care where one parent receives the sole parent rate and the other the single rate of benefit. Seventy-four children were involved in the shared care arrangements and 38 of those receiving the sole parent rate were female." Ms McKenzie stated that the statistics provided to the Select Committee cannot be relied on as accurately reflecting the numbers of beneficiaries with shared care arrangements and that no records were kept about whether a benefit had been granted following the application of s 70B generally (or s 70B(3) specifically).

Evidence of Bede Joseph Hogan

[40] Mr Hogan is the Policy Manager of the Income Support Team in MSD. He gave evidence about the current situation under s 70B, the situation prior to 1991, and the 1991 policy development process which led to domestic purpose benefit entitlements in the case of shared custody being amended so that only one benefit is payable.

[41] Mr Hogan discussed the application of s 70B(3) and stated that if current circumstances do not identify a parent with greater responsibility (as assessed in accordance with s 70B(2)), the approach of identifying the parent who was primarily responsible for day to day care of the dependent child immediately before separation is sensible and workable as it provides another method of determining primary responsibility by looking at the arrangements the parents made themselves immediately before they began living apart. Mr Hogan did not accept the suggestion that s 70B(3) indirectly discriminates on the basis of gender and stated that it uses past arrangements, chosen by the parents themselves, to decide who is to be the parent to be treated as having primary responsibility for a dependent child for benefit payment purposes. He also stated that its application attempts to avoid placing separated parents in the position of having to reach agreement between themselves by providing a "stepped-down" framework for decision-making so that s 70B(4), which requires parents to decide between themselves which of them will get the benefit, only comes into effect as a last resort. This approach avoids unnecessary friction between parents which is in the best interests of the dependent child.

[42] In addition to his evidence relating to s 70B(3), Mr Hogan gave evidence concerning the suggestion by Mr Nixon that the Ministry should apportion the payments made for a dependent child. His evidence was that apportionment would be unworkable because of the complexity of the calculations involved arising from fluidity or flexibility in arrangements. This would lead to potentially burdensome requirements to confirm circumstances every week. Additional complexities would arise when people enter new relationships or have children in other relationships, making already complex calculations even more so. Mr Hogan stated that apportionment would likely result in increased errors in entitlement calculations which would likely cause MSD to be subject to an increase in reviews and appeals.

Issue one – the absence of an assessment in respect of Mr Nixon under s 70B(3)

[43] The Crown submitted that Mr Nixon's claim regarding the discriminatory effect of s 70B(3) on himself must fail because he has never applied for a sole parent benefit and accordingly never been the subject of an assessment under s 70B(3). This submission is based on s 20J(1)(a) of the HRA which provides:

> **20J Acts or omissions in relation to which this Part applies**
>
> (1) This Part applies only in relation to an act or omission of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely—
> (a) the legislative, executive, or judicial branch of the Government of New Zealand; or
> (b) a person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[44] It is submitted that the failure of Mr Nixon to identify an act or an omission in respect of the application of s 70B(3) to himself is fatal to his case. Further, it is submitted that even if the case was brought by a beneficiary advocacy group and not by an individual, that group would have to identify s 70B(3) decisions that constituted the requisite act or omission for the purposes of s 20J(1)(a).

[45] If our consideration of Mr Nixon's complaint was confined to acts of the executive, this decision would stop here. Having never made an application for sole parent benefit, and having never had s 70B(3) applied to his circumstances (which assumes an assessment of the current arrangements under s 70B(2) would be inconclusive as to which of Mr Nixon or his ex-partner have greater responsibility for the child), there is no act or omission by the executive in respect of Mr Nixon that can be said to discriminate against him either directly or indirectly.

Issue two – legislative action giving rise to discrimination?

[46] Mr Nixon has never claimed to have had s 70B(3) applied to him. His case is that s 70B(3) disentitles him from eligibility to a sole parent benefit on the ground of his sex. The absence of an assessment under s70B(3) does not preclude Mr Nixon from also complaining that the section is itself an act of the legislative branch that discriminates against him. In this context, his complaint is about the legislation itself and his anticipated treatment under it. We consider that, having heard the evidence and submissions of both Mr Nixon and the Crown concerning whether s 70B(3) breaches the right to freedom from

discrimination, it is appropriate to consider whether s 70B(3) is an act or omission of the legislative branch of government that directly or indirectly discriminates against Mr Nixon.

[47] The ability to complain about legislation under Part 1A is not restricted to persons personally affected by it. In *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295 (HC) Miller J held that under s 76(2)(a) of the HRA, there was no express requirement that a complainant have any connection with the subject matter at all, that, by their very nature, discrimination cases may have consequences that transcend the private interests involved, and that Part 1A was intended to open the possibility of anti-discrimination challenges to all manner of public functions.

[48] At [56] Miller J stated:

> I cannot accept the Attorney-General's contention that a "complainant" for the purposes of section 92B must be an alleged victim of discrimination or someone acting on his or her behalf. On the contrary, both the ordinary and natural meaning of "complaint" and "complainant" in the legislative history suggests that any person may complain of discrimination.

[49] Consequently, not being a person who has personally been the subject of a s 70B(3) assessment does not prevent Mr Nixon from complaining under Part 1A that it is discriminatory. Mr Nixon's difficulties lie elsewhere, in that he confines his claim to the effect of s 70B(3) on himself personally and has been clear that he is not alleging that s 70B(3) discriminates against men generally. In his statement of claim Mr Nixon stated that:

> I do not wish to litigate this case for all beneficiary fathers in similar circumstances. There may or may not be differences according to individual cases. I only wish to seek a remedy in my case.

[50] The problem is that, pursuant to s 92J of the HRA, the only remedy that can be awarded if Mr Nixon makes out a claim that s 70B(3) has a discriminatory effect on him personally, is a declaration that s 70B(3) is inconsistent with the right to freedom from discrimination affirmed by s 19 of BORA. Such a declaration would have a wider effect than for only Mr Nixon and would require the Tribunal to make a conclusion as to the effect of s 70B(3) in general.

[51] We will turn first to the issue of whether s 70B(3) discriminates against Mr Nixon. As will be seen for the reasons which follow, we find that it does not. We will then consider the further issue of whether s 70B(3) discriminates against separated fathers in general.

Does s 70B(3) discriminate against Mr Nixon?

[52] Discrimination involves first, differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. Second, there must be a discriminatory impact (the differential treatment must impose a material disadvantage on the person or group discriminated against). See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109] (followed and applied in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [125] and affirmed recently in *Ngaronoa v Attorney-General*; *Taylor v Attorney-General* [2017] 3 NZLR 643 at [117]–[119]).

[53] Indirect discrimination concerns the application of a practice or requirement that while neutral on its face, has the effect of treating an individual or group differently by reason of one of the prohibited grounds. Section 19 of BORA applies to both direct and indirect discrimination: See *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

[54] In determining whether there is differential treatment between comparable people or groups, the identification of a comparator enables a determination of whether the person or group has been treated differently to another person or group in comparable circumstances: See *McAlister v Air New Zealand* [2009] NZSC 78 [2010] 1 NZLR 153 at [34] and *Ngaronoa* at [120]-[121].

[55] In her article, "Indirect Discrimination Reconsidered" [2007] NZ Law Review 27 at 44, Selene Mize identified three requirements to be satisfied in establishing a *prima facie* case of indirect discrimination in respect of a group. First the experience of the groups, in terms of experiencing positive or negative effects must be significantly different. Second there must be statistical or other evidence suggesting the disparity is real. Third, the negative effect experienced must be significant and not trivial.

[56] Mr Nixon complains that s 70B(3) has a discriminatory effect on him by reason of the prohibited ground of sex and that imposes a material disadvantage on him because he receives no support in his benefit in respect of the costs associated with his daughter, despite his equal sharing of her care. Because s 70B(3) of the SSA is couched in gender neutral terms, he alleges that it discriminates against him indirectly. He says that, pursuant to s 70B(3), his sex is the reason why Ms Coles receives the sole parent support benefit instead of him.

[57] Mr Nixon argues that because his separation from Ms Coles occurred at the time his daughter was breastfed, s 70B(3) in his case makes it "biologically impossible" for him to get the benefit. In this regard, he claims that Ms Coles' greater responsibility for their daughter up to the age of six months was a matter of "biological necessity". The law is therefore discriminatory in the specific and limited circumstance of separation occurring when the child is aged under 18 months and/or is being breastfed.

[58] In closing submissions, the Crown has argued that Mr Nixon has not established why giving birth and the ability to breastfeed means that it is a biological necessity that the mother is the primary caregiver when a child is aged 18 months or under, or in other words, why the s 70B(3) test of primary responsibility pre-separation reflects gender rather than parental choice about the family responsibilities. It is submitted that s 70B(3) does not specify any gender dependent factors and depends on arrangements made by the parents themselves.

[59] The Tribunal notes that the separation between Mr Nixon and Ms Coles occurred when their daughter was six months old. Mr Nixon assumed half-time care for her when she was aged around two and a half. Because Ms Coles is already in receipt of the sole parent benefit in respect of the daughter, if Mr Nixon made an application for a sole parent benefit under s 20D, an assessment of his entitlement would be made under s 70B to

determine which of Mr Nixon and Ms Coles has the greater responsibility for the daughter. In making this assessment, the factors listed in s 70B(2) would be applied. These are:

> **[59.1]** how responsibility for decisions about daily activities of the child is shared;
>
> **[59.2]** who is responsible for taking the child to and from school and supervising the child's leisure activities;
>
> **[59.3]** how decisions about the education and health care of the child are made;
>
> **[59.4]** financial arrangements for the child's material support;
>
> **[59.5]** which parent pays the expenses of the child.

[60] If the case manager was unable to conclude that either Mr Nixon or Ms Coles had greater responsibility in terms of s 70B(2), s 70B(3) would be applied. This requires the chief executive to ascertain which parent was the principal caregiver in respect of the child immediately before the parents began living apart. The guidelines attached to Ms McKenzie's brief provide that this will be the parent who was mainly responsible for the day to day care of the child prior to the separation. Mr Nixon was very involved with the care of his daughter at this time and took financial responsibility for her. In Mr Nixon's view, the breastfeeding role gave Ms Coles greater responsibility although this is not a factor taken into consideration under s 70B. Mr Nixon also started a course of study during this period which he relies on as pointing to Ms Coles being the principal caregiver.

[61] A finding under s 70B(3) that Ms Coles was the principal caregiver prior to separation would result in Mr Nixon being ineligible for the sole parent benefit. He says that this discriminates against him on the ground of sex because the decision about the daughter's care arrangement prior to separation was made so that Ms Coles could breastfeed her. He compares himself to Ms Coles and says the difference between them is sex.

Conclusion - discrimination against Mr Nixon personally

[62] Accepting for the purpose of this decision that it is correct that an assessment under s 70B(3) would favour Ms Coles, it is not accepted that her favourable treatment is by reason of her sex. Both Mr Nixon and Ms Coles had left their employment around the time of the daughter's birth. Either was available to provide the daughter's care and both did, to a greater or lesser extent. Mr Nixon and Ms Cole decided that the daughter should be breastfed and that she should be mainly with her mother. Mr Nixon was clear in his evidence that he supported Ms Coles' primary care of their daughter and considered this to be in the daughter's best interests. He elected to commence a course of study at this time. It is notable that, with the agreement of Mr Nixon, Ms Coles' primary care of the daughter continued after breastfeeding had ceased, during the time Mr Nixon described himself as a "weekend and holiday Dad". Again, this arrangement reflected the decisions made between Ms Coles and Mr Nixon about their daughter's care.

[63] It is not established that the reliance on pre-separation arrangements which would be made should Mr Nixon apply for a sole parent benefit and provoke a s 70B assessment,

discriminates against Mr Nixon on the ground of his sex. Either parent may have had principal care for the daughter at the time of separation. Many children are not breastfed. The arrangement was reflective of parental choice rather than sex.

[64] It follows that s 70B(3) SSA is not an act of the legislative branch that directly or indirectly discriminates against Mr Nixon.

Discrimination generally by s 70B(3)

[65] Although the above conclusion makes it unnecessary to assess the wider issue of whether s 70B(3) discriminates on the ground of sex more broadly, the Tribunal will now briefly turn to this issue.

[66] Although Mr Nixon specifically limited his claim to his particular circumstances, he asks the Tribunal to take judicial notice of the societal and cultural norm that the mothers of young children are more likely to have greater responsibility for them than fathers. He relies on practices in New Zealand prisons and in a Canadian immigration detention centre which allow babies to reside with their incarcerated mothers to facilitate breastfeeding. He also relies on statistics concerning split care (where one parent has full time care for one or more children of the relationship and the other parent has full time care of another child or children of the relationship). An undated briefing paper included in the common bundle noted that the parents receiving the emergency maintenance benefit (paid to the split care parent not receiving the sole parent benefit) were mainly male (504, constituting 82 percent). See: *Social Security Act rewrite: Changes to legislation to improve frontline efficiency and enable modern service delivery* (MSD.001.0513) (common bundle p 45).

[67] As noted earlier, there is no evidence before the Tribunal concerning the application of s 70B(3), with regard either to the numbers of determinations made with respect to it, or the outcome of those determinations.

[68] Mr Nixon submitted that the failure on the part of MSD to keep statistics concerning the application of s 70B(3) was unreasonable and unfair. He has relied on very young children being in the care of mothers as being a "cultural norm". However, s 70B(3) can be applied in respect of dependent children up to the age of 14. Separation of parents will no doubt occur in many cases where their children are not infants but rather are of school age, and where both or neither of the parents are working. There is no evidence before the Tribunal concerning the effect of the application of s 70B(3) in such cases other than the MSD guidelines which are written in gender neutral terms.

[69] Mr Nixon also relies on statistics concerning the emergency maintenance benefit paid in split care situations referred to at [58] above. These statistics show the recipients are mainly male. However, they are of little assistance, as the statutory criteria for determining which parent receives the sole parent support benefit in split care situations (set out in s 20C of the SSA) are somewhat different from those applied in s 70B in shared care situations.

[70] Finally, Mr Nixon relies on six decisions of the Social Security Appeals Authority (SSAA) concerning the application of s 70B of the SSA and the decision of the High Court

in *Samuels* v *Chief Executive of the Ministry of Social Development* [2006] NZFLR 223 (HC) which also considered s 70B and the issue of primary responsibility for the care of children. These decisions were included in the bundle of authorities filed at the hearing by the Crown. See: *Re SSA 132/11* [2012] NZSSAA 41; *Re SSA111/11* [2012] NZSSAA 44; *Re SSA 17/14* [2014] NZSSAA 44; *Re SSA 34/14* [2014] NZSSAA 92; *Re SSA 160/14* [2015] NZSSAA 34; *Re SSA 1/15* [2015] NZSSAA 30. Mr Nixon submitted that the fact that of these decisions, only one involved a female applicant or plaintiff challenging the application of s 70B in favour of the other parent, demonstrated gender bias in the application of s 70B.

[71] Although MSD does not hold statistical evidence on the relative numbers of men and women who have been found to be the principal caregiver pre-separation under s 70B(3), the Crown submits that even if more women than men were assessed as having been principal caregiver immediately prior to separation this would not establish discrimination. It would simply reflect the private decisions that had been made about family care arrangements. If men are disproportionately excluded from the role of principal caregiver, this is due to choice. The Crown also noted that s 70B(3) will apply to same sex couples with children in exactly the same way. Further, there will be cases where neither parent can be identified as having been the principal caregiver prior to separation. Section 70B(4) clearly anticipates this scenario by providing a final step for determining the recipient of the sole benefit available.

Conclusion on discrimination generally by s 70B(3)

[72] Assessing the effect of s 70B(3) in the absence of evidence concerning its application and effects would require the Tribunal to make generalisations about the families affected by it. In *Claymore Management Ltd v Anderson* [2002] 2 NZLR 537 (HC), the High Court noted in a case concerning family status discrimination at [153] that the complexities of modern society and family arrangements preclude accurate generalisations, and that in a parental partnership, even when one partner works full time, one parent cannot necessarily be permanently fixed with the label of part-time carer and the other a full-time carer label. The court commented at [158] that the need both to ascertain the comparator group and to present appropriate evidence of the differential effect is critical in assessing discriminatory effect.

[73] It is not established that s 70B(3) discriminates against men in favour of women. As noted earlier both s 70B and the guidelines for its operation are written in gender neutral terms. There is no mention of giving birth or breastfeeding as factors for decision-making in any aspect the guidelines for its operation.

[74] The limited evidence pointed to by Mr Nixon, in the form of statistics concerning split care arrangements under s 20C of the SSA, the gender of parties in a limited number of SSAA and High Court decisions concerning s 70B, and "societal norms", falls short of establishing differential treatment between men and women under s 70B(3). Given the caution expressed in *Claymore,* the Tribunal is not in a position to make generalisations regarding the family arrangements that may have existed in families where two separated parents share the care of their children equally and are both beneficiaries, especially given

the wide range of ages (up to 14 years) of dependent children for whom sole parent support benefit is paid. It is also accepted that, in any case, such arrangements are reflective of parental choice. It follows that s 70B(3) is not an act of the legislature that directly or indirectly discriminates against Mr Nixon or beneficiary fathers in general.

CONCLUSION

[75] Section 70B(3) does not limit Mr Nixon's right to freedom from discrimination. Neither is it established that s 70B(3) in general is inconsistent with the right to freedom from discrimination. Given this conclusion, it is unnecessary to consider the final issue of justified limitation. The claim is accordingly dismissed.

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Ms MA Roche	**Ms GJ Goodwin**	**Ms K Anderson**
Co-Chairperson	**Member**	**Member**