**RESPONSE TO CALL FOR EVIDENCE ON THE PERSONAL INJURY DISCOUNT RATE**

This Response is submitted by Chris Barnes K.C. I am a barrister specialising in personal injury and clinical negligence claims. I am fundamentally opposed to a dual discount rate or multiple discount rate system, for the reasons detailed below. I have not addressed the specific questions as many are not within my area of expertise and experience (i.e. they are complex actuarial issues) and, to the extent that they fall within my expertise, my thoughts are set out.

1. I do not agree with the premise of the Call for Evidence, specifically that “it has been argued that it (a single discount rate) can result in unfairness to claimants” (as per the Forward). The Call for Evidence provides no evidence that such arguments are being made or being advanced. I am aware of no such arguments being advanced. In fact, it is clear from the analogy that is drawn with other common law jurisdictions that potential unfairness to claimants is not and has not prompted this Call for Evidence. In none of those jurisdictions would the claimant be better compensated than in England; in fact, the discount rate in each of those (whether a single or dual discount rate) is less attractive to a claimant and would result in a lower award of damages.
2. The notion and application of a discount rate is already a difficult and complex one for a lay claimant to understand. Claimants in catastrophic injury claims are almost invariably suffering from a significant disability that impacts on their ability to understand and apply complex actuarial concepts (whether by virtue of an acquired brain injury or serious physical injury resulting in significant pain and high levels of medication). Imposing a dual discount rate would render the active involvement of a vulnerable claimant in that part of the decision making (when determining how to advance, and compromise, a sizeable claim) almost impossible. At a time when the law generally is seeking to assist vulnerable claimants with taking an active role in their legal claim (see, for example, the recent change to the Overriding Objectives in the Civil Procedure Rules which mandates that the court must take positive steps to ensure and assist with such involvement) it would be a heavily retrograde step to impose a dual rate comprehensible only to expert actuaries. The measure, if adopted, would indirectly discriminate against disabled claimants.
3. An unintended consequence of the imposition of a dual discount rate would be a very significant increase in the level of deputyship costs (which are recoverable as a head of claim from defendants). The deputy is required to invest the funds on behalf of the injured person and can recover their costs of doing so. If alternate investment strategies have to be devised for different heads of claim and different periods of loss the costs will increase significantly.
4. In those cases where a claimant is vulnerable but doesn’t quite meet the test of mental incapacity, it would be wrong to require them to make complex investment decisions about the management of their compensation. There would inevitably be, or have to be, a change in the current law which prevents such a claimant from recovering the costs of investment advice. That, in turn, would lead to a substantial increase in the damages being recovered by injured claimants.
5. If there is to be a step change in the discount rate adopted for different future periods, there would inevitably be an increase in litigation relating to claims hovering around that step change, with a corresponding increase in litigation costs.
6. Imposing a dual discount rate with, presumably, frequent changes in the rate would make it very difficult to advise claimants as to a proper and fair valuation of their claim, with potential for a significant increase in litigation costs as a result.
7. The process of reviewing the discount rate would be more complex and take longer if a dual or multiple rate system were adopted. There is already widespread disquiet about the infrequency of that review, with the Lord Chancellor’s Department previously having been the defendant to a judicial review compelling action on point. There is likely to be an increase in such disquiet, and such challenges, in the event of a dual or multiple rate.
8. It is a fallacy, and wrong, to suggest that a claimant can afford to take risks with some parts of their compensation but not with others (thereby justifying a different discount rate for the different component parts of the claim). While a claimant might need damages for his or her future care needs to be ring fenced, equally important will be the damages for their future loss of earnings without which they would be unable to support their family or meet their daily living expenses.
9. Suggesting that different discount rates could be adopted for different future heads of loss ignores the practical reality of how a deputy (or claimant) administers funds post-settlement. Essentially, the damages are pooled and then used however fit. They are never ring fenced to a specific head of claim.
10. It is wrong to draw on the example of other common law jurisdictions that have adopted a multiple discount rate without a root and branch comparison of the law relating to recovery of damages in each relevant jurisdiction. Cherry picking one aspect from each is likely to give a misleading impression or comparison.
11. It would be much better for the government and the courts to encourage the use of Periodical Payments Orders. A PPO avoids the need for any discount rate when considering that element of the claim (and the future loss claims met by PPO are invariably the largest ones).

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