

 **FOIL’s Focus for 2022**

If calm comes before the storm, what comes afterwards? Business turmoil such as we have seen over the past 15 months leaves behind uncertainty, the need for adjustment, and continued challenges which have the potential to confound predications and planning. The practicalities of the pandemic have changed every aspect of practice for FOIL members, from where they work, how they liaise with clients, how they manage, motivate and train their staff, and how they conduct litigation.

At the same time a political and social landscape built on an urgent need for change is being reflected in new business priorities. Brexit continues to create political and business uncertainty and the culture of business life is under close scrutiny, particularly regarding issues around climate change and diversity and inclusion, with a pressing need for a new approach.

Put together, this creates a business environment with significant challenges but one with plenty of opportunity and potential for positive developments and reform which would have been unthinkable in early 2020.

For FOIL, the next 12 months will be a period of evaluation. One of FOIL’s strengths is its ability to look behind the headlines, to use the combined experience of its member firms to inform its thinking and develop innovative and pragmatic ideas and proposals. Invariably, the success or otherwise of reform rests not in the big picture but in the detail. With so much change having happened so quickly, more than ever decisions for the future need to be grounded in analysis and evidence: a clear view on what is working and should be retained, and what needs further change.

As always, alongside its members, FOIL seeks to work closely with the insurance industry, a sector which has faced its own challenges over the past 15 months both in the claims environment and in a public examination of the role of insurers in delivering financial security and social change. FOIL’s focus is on understanding the pressures and opportunities for the industry it serves and being at the heart of the on-going debates.

The pandemic has been described as the world’s biggest pilot project. It is now time to capitalise on the potential that has created for significant reform, now not through necessity but judged on its own merits. FOIL’s aim is to play a full part in 2022 in steering and delivering that change, ensuring that the defendant voice is heard.

**EXECUTIVE SUMMARY**

**Part A. The business world in 2022 – “From Hard Times to Great Expectations”**

FOIL’s work in 2022 will include working with the insurance industry and members to:

1. support the insurance industry, with legal advice, innovation and empathy as the sector transitions to sustainable underwriting, employment, investment and purchasing practices,
2. work collaboratively with each other to develop plans to bring their firm’s net carbon output to at least zero, with an ambition of a net negative by 2030,
3. promote diversity, inclusion and well-being in the work place,
4. support members and insurers as we find the best ways to work together in the future using the lessons learned from the pandemic.

Investors, regulators, customers and employees expect unequivocal evidence of corporate conduct that truly reflects the responsibility of business in these times.

By being at the forefront of these conversations FOIL, London FOIL, FOIL Ireland, FOIL NI, FOIL Scotland and Tomorrow’s FOIL will add value for our members and their clients.

**Part B. Technical and legal focus**

FOIL’s technical work in 2022 will include:

1. The reform of the claims process **-** the work of the MOJ and the CJC over the coming year will see significant proposals for reform of the civil justice regime, in particular on pre-action conduct. Further reform is also expected in Scotland and Northern Ireland.
2. Civil Litigation Post-COVID– following the enormous changes to the civil justice regime to keep the system operating during the pandemic, the focus now is on longer term reform – what changes should stay and what further reforms are needed. HMCTS resource is an important issue. The regimes in Scotland and Northern Ireland will also be under review.
3. The OIC **-** the new claims portal is now open for business but important issues remain to be resolved**.** The technical operation, the working of the new rules, and further developments of the process will be under close scrutiny over the coming year.
4. Harnessing the benefits of cross-industry working– there are sound reasons for a cross-industry approach to problems where that is possible. The government and bodies engaged with reform welcome joint proposals and the need for a pragmatic approach during the pandemic has highlighted how collaboration can encourage best practice**.**
5. Wider governmental reform **–** beyond the remit of the MOJ, 2022 is likely to see proposals and legislation on a wide range of issues from across government is all UK jurisdictions, from cladding to e-scooters. Involvement in the setting of the Discount Rate in Northern Ireland is a key FOIL objective.
6. Reform of the costs regime **–** new Guideline Hourly Rates introduced under a flawed process in 2021 and the extension of the Fixed Recoverable Costs regime in 2022 make the control of legal costs a vital lobbying issue for FOIL.The implications of QOCS in Scotland will feed through into claims in 2022.
7. The on-going fall-out from Brexit– the government may consider Brexit “done” but it continues to throw up legal and regulatory problems. FOIL will follow closely the caselaw and legislation expected in 2022.
8. The challenge and opportunities of technological change and innovation **–** the pandemic has given increased impetus to the use of technological developments to support new business practices and provide new claims handling solutions. Technology is an increasing factor in damages claims and in the development of insurance products and new areas of cover.

**Part C. FOIL’s own development**

FOIL’s strategic focus in 2022 will include:

1. Business support – continuing to increase the focus on the benefits to business that collaboration brings for FOIL members, majoring on the increased importance to investors, regulators, customers and employees of a company’s carbon emissions and diversity & inclusion policies.

1. Trade Bodies Association – building up this group of like-minded trade bodies into a coherent and powerful lobby.
2. FOIL Scotland – increasing the influence and profile of this division of FOIL in Government, judicial and insurance circles in Scotland.
3. FOIL Northern Ireland – similarly increasing the influence and profile of this part of FOIL in Government, judicial and insurance circles in Northern Ireland.
4. FOIL Ireland – agreeing a mandate from the members for this division and enhancing its place in a new market.
5. Tomorrow’s FOIL – strengthening the appeal of this division of FOIL to lawyers with less than 5 years’ PQE.
6. London FOIL **–** wider promotion of the work of this division designed to support (re)insurance lawyers serving the London and Lloyds markets, to increase awareness and understanding of the value of this division.
7. Training and Development – building new ways of providing technical training for insurance lawyers.

**IN DEPTH**

**PART A. The business world in 2022 – “From Hard Times to Great Expectations”**

FOIL’s work in 2022 will include working with the insurance industry and members to:

1. **Support the insurance industry, with legal advice, innovation and empathy as the sector transitions to sustainable underwriting, employment, investment and purchasing practices,**

The insurance industry is uniquely positioned to influence corporate behaviours in multiple ways - as an underwriter of risk, as an employer, as an investor and as a purchaser of services.

The industry’s mandate is to devise innovative risk-transfer solutions that minimise the financial consequences of uncertainty. In the face of climate change, such a mandate is now more relevant than ever.

As insurance lawyers, FOIL members can play a significant role in supporting innovative risk transfer by helping to develop smart contracts to support distributed ledger technology, producing clear wordings on parametric covers to close the protection gap in countries most challenged by climate change, innovating ‘insurance on demand contracts’ for the disrupted way we work now, and investing in technology to help lessen carbon emissions by reducing business travel.

1. **Work collaboratively with each other to develop plans to bring their firm’s net carbon output to at least zero, with an ambition of a net negative by 2030.**

Every FOIL member already has its own plan to improve the carbon footprint of its business. By creating a platform and space for members to exchange views and practices FOIL will help each member firm to achieve their goal sooner.

1. **Promote diversity, inclusion and well-being in the work place.**

The evidence for the value diversity brings is now compelling. It is now proven that companies with more diverse management teams have higher revenues due to innovation. This shows that diversity is not just a metric to be strived for; it is actually an integral part of a successful revenue-generating business.

Businesses need the right people to manage the  societal challenges posed by climate change and concerns for individual and collective well-being, and consider the role and impact of corporate policy on shaping behaviours now and in the future.

Employers need to attract and retain a broader and deeper talent pool to reflect their customer base and prevent ‘group think’. They need to attract people from other industries into the market, people who can bring experience and fresh perspectives, who don’t come from the same narrow demographic and who can challenge and change the status quo.

1. **Support members and insurers as we find the best ways to work together in the future using the lessons learned from the pandemic.**

FOIL will continue to adopt much greater use of technology to deliver more events per annum than has previously been possible due to the logistical challenges of hosting physical meetings. A hybrid programme of face to face networking opportunities (when possible) and efficient virtual business meetings and technical discussions will be deployed.

Better protection of customer data is also a key industry priority. The industry has more to do in supporting the management of cyber claims and working effectively with regulators and information commissioners on the fair and equitable management of data breaches.

**Part B. FOIL’s Technical and Legal Focus**

1. **The reform of the claims process**

**Whilst civil litigation has undergone significant change over the past decade, the pre-action process has changed relatively little since the Woolf reforms. The pressures of the court COVID backlog, a Master of the Rolls keen to encourage wider use of ADR, and the current CJC review of the Pre-Action Protocols together create an environment which is likely to see a greater emphasis on pre-action conduct. Civil justice reform is also a key issue in Scotland and Northern Ireland.**

* Full engagement with the CJC review of Pre-Action Protocols and the MOJ’s examination of Dispute Management.
* Full engagement with the shadow CJC review of PAPs in Northern Ireland.
* Full engagement with the CPRC programme of rolling consultations and its ‘Future Vision’ programme of reform.
* Support of Mr Justice McAlinden’s initiative to develop a new Credit Hire PAP in Northern Ireland.
* A new regime for lower value clinical negligence claims.
* A new regime for lower value NIHL claims.
* The conduct and review of the current pilot of PD 51ZB as part of the programme of digitalisation of the court process.
* Support for and development of the Serious Injury Guide (including the current pilot to extend the Guide to medium value claims) and the Rehabilitation Code.
* Issues arising from the introduction of QOCS in Scotland.
* The implementation of Lord Gillen’s recommendations on Civil Justice in Northern Ireland.
1. **Civil Litigation Post-COVID**

**Changes introduced as a result of the pandemic have put in place new working practices within the civil justice systems, with a much greater emphasis on remote hearings. Decisions on the extent to which these changes should become a permanent feature of the regimes will shape the conduct of litigation for the long term. With the MOJ budget likely to remain under severe pressure, the immediate problems of delay and lack of resource also need to be addressed.**

* Continued review and analysis of the pros and cons of remote hearings, remote medical examinations and remote rehabilitation, to enable full participation in the debate on reform across all UK jurisdictions.
* Lobbying for a standard process for remote hearings and the preparation of e-bundles.
* Reform of the CPR to reflect remote working and remedy the procedural shortcomings exposed by the COVID crisis.
* Addressing the problem of late and multiple adjournments of trials and the resulting wasted costs.
1. **The OIC**

**With the OIC now in operation, the work of the FOIL OIC working group has moved on from a detailed analysis of the new rules to consideration of how the new system is working in practice. Important issues remain to be resolved and development of the system will continue.**

* On-going monitoring, review and feedback on the early days.
* On-going review of published data, in principle and in detail.
* The handling of claims of ‘exceptional circumstances’ and additional injuries claimed alongside whiplash.
* Continued leadership of the cross-industry initiative to develop proposals to deliver rehabilitation as part of the OIC.
* The MOJ response on Part 2 of the whiplash consultation, including rehabilitation and credit hire.
* Future development of the OIC (including FOIL membership of the OIC Advisory Working Group)
* Consideration of the representation for OIC claimants and the conduct of CMCs.
1. **Harnessing the benefits of cross industry working**

**Whilst the views of claimant and defendant representatives on compensation and civil justice issues are often polarised, there are areas of common ground where there are benefits in working together. The need for a pragmatic approach over the pandemic has shown that agreement on best practice, even if non-binding, provides a useful steer, with cross-industry proposals more likely to find favour with government and reform bodies.**

* The problem of claims issued in the wrong forum.
* Improvements in the process for obtaining medical evidence in neurodegenerative claims.
* The use of ADR, particularly in the context of reform to the pre-action process.
* The development of the FOIL/APIL Best Practice agreement put in place during the pandemic, to reflect post-COVID issues and reduce claims friction.
* The increase in recoverable benefits brought about by Universal Credit.
* Continued work on the cross-industry rehabilitation initiative, led by FOIL.
* The potential for a new PAP for abuse claims.
1. **New claims areas.**

**The claims sector is innovative and agile. New areas of claim will arise, both as a result of improved awareness of risks and, of greater concern, opportunistic behaviour by claimant representatives. FOIL aims to be a source of information and expertise as these new areas arise.**

* Dementia claims in sport
* The increased use of e-scooters, both legally and illegally.
* Claims arising from COVID.
1. **Wider governmental reform.**

**Issues of importance to the insurance industry extend well beyond the Ministry of Justice. Policy in a number of areas is dependant upon the provision of insurance and as proposals and legislation are brought forward FOIL aims to work closely with the industry and its representative bodies to steer reform.**

* The compulsory motor insurance regime after Brexit
* Property, construction and professional indemnity issues arising as a result of the post-Grenfell cladding crisis.
* Climate change issues, including flooding, for insurers and local authorities.
* The potential for e-scooters to be legalised, and the arising regulatory regime.
* The legal and practical challenges presented by automated and driverless cars.
* The increase in recoverable benefits brought about by Universal Credit.
* The establishment of a new methodology for setting the discount rate in Northern Ireland.
1. **Reform of the costs regime.**

 **FOIL has serious concerns that recent developments and caselaw regarding legal costs is rendering the system of recoverable costs unfit for purpose, with the potential for excessive legal costs to reduce access to justice for all parties. The implementation of Lord Justice Jackson’s proposals to extend FRC, and proposed changes to the existing FRC regime, will be a major focus for FOIL in 2022.**

* Lobbying for a new methodology for the setting of Guideline Hourly Rates.
* Full engagement with the MOJ and the CPRC in the implementation of Lord Justice Jackson’s supplemental report on the extension of fixed costs, including the development of the new rules.
* The challenge to the existing low value FRC regimes created by CPR changes on vulnerable parties, and potential changes to payment for disbursements.
* Addressing problems in the QOCS regime highlighted in the Supreme Court decision in *Adelekun v Ho.*
* The extension of costs budgeting to mesothelioma claims
* The introduction of fixed costs in clinical negligence.
* An understanding of the costs implications of process reform, including remote hearings.
* The implications of QOCS in Scotland.
1. **The on-going fall-out from Brexit.**

**It was inevitable that Brexit would create intractable problems impacting upon the UK’s political, legal and regulatory regimes long after 31 December 2020. The trade deal in place from January 2021 has left open questions on interpretation of the current law in the light of Brexit, and on future change.**

* The identification of opportunities arising from Brexit to improve and reform the current legal and regulatory landscape.
* The impact of Brexit on the motor insurance sector.
* The awaited government response to *Vnuk.*
* Issues arising from the rush to issue proceedings before 31 December 2020.
* The increased complexity of cross-border claims post-Brexit.
1. **The challenge and opportunities of technological change and innovation.**

 **The business operations of FOIL members and their clients, and the way they work together, has seen significant change over the past 15 months, with a new for technological solutions to deliver pragmatic solutions. On-line justice is becoming an everyday reality and technological advances are feeding into damages claims and new areas of cover.**

* The challenges of home working.
* An effective move to the delivery of remote and digitalised civil justice.
* The growth of Online Dispute Resolution and ADR.
* The development and application of AI and digital processes.
* The legal and regulatory challenges presented by the likely legalisation of e-scooters and the continued development of autonomous and driverless vehicles.
* The development and growth of cyber cover.
* Meeting the needs of ‘digital natives’.
* The use of technology and medical advances to improve the outcome for claimants.
* The evolving nature of product risks.

**Part C FOIL’s own development**

FOIL’s strategic focus in 2022 will include:

1. **Business support – continuing to increase the focus on the benefits to business that collaboration brings for FOIL members, majoring on the increased importance to investors, regulators, customers and employees of a company’s carbon emissions and diversity & inclusion policies.**
* Continue the work of the FOIL ESG Board to consider how change will affect service suppliers and purchasers and how FOIL members can work together with their clients to strengthen relationships, through responsible corporate behaviours.
* The Group will look at how conduct affects:
	+ Climate change
	+ Diversity & Inclusivity
	+ Wellbeing
	+ Mental Health

* The group will consider all areas of culture and values helping FOIL members to fully recognise the impact upon their own organisations as well as the sector more broadly.
* By extension this will heavily influence the relationships between our members and their instructing clients and associated regulators or governing bodies. The scope of this group will therefore extend to fully consider this area too.
* We will actively engage with our members, the insurance providers, trade associations and other organisations with a vested interest in the subject. The Group will form a standing committee to create and steer the agreed strategies, supported by working groups convened to tackle specific issues”.
1. **Trade Bodies Association**  – **building up this group of like-minded trade bodies into a coherent and powerful lobby.**
* The TBA will continue to meet quarterly to discuss issues of common interest, to identify lobbying opportunities and to represent the views of their members to other trade bodies.
1. **FOIL Scotland** – **increasing the influence and profile of this division of FOIL in Government, judicial and insurance circles in Scotland.**
* Working alongside the Forum of Scottish Claim managers to establish a second independent defendant voice in the Scotland market.
* Supplying a more centralised admin and support service regime, especially for national SFTs.
* Bedding in the new role of Chair of FOIL Scotland ensuring that the local and UK wide activities of FOIL continue to meet the expectations of members in Scotland.

1. **FOIL Northern Ireland** – **similarly increasing the influence and profile of this part of FOIL in Government, judicial and insurance circles in Northern Ireland.**
* Working to establish an independent defendant voice in the Northern Ireland market.
* Supplying a more centralised admin and support service regime, especially for national SFTs.
* Ensuring smooth succession for the new Chair of FOIL NI to make sure that the local and UK wide activities of FOIL continue to meet the expectations of members in Northern Ireland.
1. **FOIL Ireland** – **agreeing a mandate from the members for this division and enhancing its place in a new market.**
* Increasing the range of learning events delivered to members.
* Supporting the members of the FOIL Ireland Executive in the ex officio National Committee role
* Creating a greater level of engagement as between FOIL UK and FOIL Ireland (both ways)
* Understanding the post Brexit environment in Ireland.
1. **Tomorrow’s FOIL** – **strengthening the appeal of this division of FOIL to lawyers with less than 5 years’ PQE.**

The 2020 member satisfaction survey revealed that TF is little known amongst respondents, so we need to promote awareness of everything that this division offers.

* Finding ways to recreate the networking opportunities TF events used to offer.
* Adding a FOIL Ireland rep seat to the TF Executive.
* Establish a three year succession plan for Vice President and President.
* Identifying a single point of contact at each member firm.
1. **London FOIL – wider promotion of the work of this division designed to support (re)insurance lawyers serving the London and Lloyds markets, to increase awareness and understanding of the value of this division.**
* Identifying additional areas of interest unique to the London and Lloyds (Re) Insurance market and building SFTs to major on these subjects.
* Expanding and promoting the London Members’ Library.
* Recruiting new members.
1. **Training and Development** – **building new ways of providing technical training for insurance lawyers.**

With a business environment involving so much change, being well trained and well-informed has never been more important. FOIL will continue to support its members’ professional development and lifelong learning.

* Effective continuing education and training for insurance lawyers.
* Embedding the principle of “working to the FOIL Standard” using the FOIL Statement of Competence and the Statements of Legal Knowledge.
* Adding to the number of Statements of Legal Knowledge within the FOIL Standard to mirror the increased range of insurance claims law covered by our SFTs.
* Encouraging all insurers to see the FOIL Standard as a key differentiator for panel review and selection purposes.

**Laurence Besemer, CEO,**

**Stuart Hardy, President,**

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