

AN INSPIRATIONAL CAREER

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What an auspicious time to be having this conference! This week you are celebrating 125 years since the women of New Zealand got the right to vote. In the UK we have been celebrating 100 years since *some* women got the right to vote and *all* got the right to sit in the House of Commons. Those of us in the know have also been celebrating 60 years since women got the right to sit in the House of Lords.

At the Peers' entrance to the House of Lords, there is a remarkable cloakroom, rather like a school cloakroom but without the shoe-boxes and a great deal grander. The pegs are named in alphabetical order. For a while there were no less than four peers 'of Richmond' side by side — Lord Hague of Richmond (William Hague, former MP for Richmondshire, leader of the Conservative party and foreign secretary), Baroness Hale of Richmond (me), Baroness Harris of Richmond (Angela Harris, prominent liberal democrat Parliamentarian and deputy Speaker of the House of Lords), and Lord Houghton of Richmond (Nick Houghton, former Chief of the General Staff). The Richmond in question is the Richmond in North Yorkshire, the first of 60 odd Richmonds all around the world, after which they are all indirectly named (including the Richmond in the South Island of New Zealand). It is a very beautiful medieval town with a Norman castle, a cobbled market place, quaint old buildings, a ruined abbey down the road, with a splendid setting in lovely

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landscape. It is remarkable that a small town with around 8,500 inhabitants should have four members of the House of Lords choosing to include it in their titles. Every peerage has to have a unique title — so if there is or has been another Hague, Hale, Harris or Houghton you have to be ‘of’ somewhere. Why, I wonder, did we all choose Richmond? I know why I did.

I was born in 1945 in Leeds, a large industrial and commercial city in West Yorkshire, centre of the wool trade. My parents were then living in Redcar on the North Yorkshire coast, but my mother’s family came from Leeds. When I was three, they moved to a village near Richmond. My school teacher father had been appointed headmaster of a small independent boys’ boarding school, re-opened after it had been requisitioned by the RAF during World War II. I went to the tiny local Church of England primary school and then to Richmond High School for Girls. I was the youngest girl in the school while my older sister was the oldest and head girl. My younger sister joined the school two years later. We all became head girls but I was least satisfactory of the three — perhaps because the school wanted me to concentrate on my academic studies, perhaps because my qualities of leadership were deemed inadequate.

Only years later did it occur to me how unfair the system was in those days. Children were sorted into academic and non-academic by the 11-plus exam. The academic went to grammar schools, the non-academic went to secondary modern schools which were anything but modern. In my area, there were less than half the grammar school places for girls than there were for boys; and there were roughly half the number of grammar school places for boys and girls in the predominantly rural North Riding of Yorkshire than there were in the prosperous commuter belt counties of Cheshire and Surrey. So we were all disadvantaged, but the girls more than the boys. I don’t believe that there were fewer clever enough people in the county — but the need for education was differently perceived both by the parents and the local politicians. One of the most important early cases under our Sex Discrimination Act 1975 decided that providing fewer grammar school places for girls than boys was unlawful, even though it was the product of the number of schools available rather than conscious policy of discriminating against girls.¹

The High School was very good for me. There were only about 160 girls. Because it was such a beautiful place, there was a stable population of very able

¹ See *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155.

teachers, mostly unmarried. We were mostly local girls, with a smattering of army daughters from Catterick Garrison nearby, now the largest army camp in the UK, who only stayed for two years. It had a wonderful building — a pioneer of modern school architecture, opened in 1939, single storey, mainly stone and glass, with large windows looking out over wonderful views towards the Cleveland Hills — indeed, looking out across fields to the house where we now live.

Disaster struck when I was 13 and my younger sister 12. Our father died very suddenly at the age of 49. Our mother had trained as a teacher in the 1930s but had been forced to give up work when she married our father in 1936. The marriage bar was suspended temporarily during the Second World War and abolished by the Education Act 1944 — apparently because it was recognised that married women ‘had certain qualifications for teaching which are not offered by either men or spinsters’² — knowing something about children, perhaps? But the women had to wait until 1955 before the Government agreed to adopt a policy of equal pay and even that would take until 1961 to implement in full.

But how fortunate we were that our mother had trained as a teacher. When our father died she picked herself up, dusted off her Froebel teacher training certificate and became the head teacher of the village primary school where my younger sister and I had been pupils (and our best friend the vicar was chairman of the governors). This meant that we could stay at the same school, in the same area, with the same friends, rather than starting afresh with my mother’s family in Leeds. I have a horrible feeling that I fared better as a big fish (academically — not in other ways) in a small pond than I would have done the other way around. It only occurred to me years later what a wonderful role model our mother was.

It was taken for granted in the family and at school that we would go to University if we could — preferably to Oxford where our father had been or to Cambridge where our mother’s father had been. Those days we could apply for both, so I did. I applied to read law, despite knowing very little about it and having no lawyers in the family, because our head mistress thought that I wasn’t a natural historian (not clever enough to read history). She suggested economics. I suggested law because I preferred the constitutional history of the

2 *Report of the Royal Commission on Equal Pay 1944–1946* (HMSO, Cmd 6937, October 1946).

17th century to the economic history of the 18th and 19th centuries. Another factor was that I did not want to end up a school teacher like my parents — ironic therefore that I went into university teaching. To her credit, the head did not protest that girls don't do law or at least not unless it's in the family — although that was largely true at the time. Luckily, I was already doing Latin A level — although I had to go down to the boys' grammar school to do so — it was a good way of missing sport.

It turned out that we were both right. I went up to Cambridge, the first from the school to do so and the first to read law. There again there was built-in sex discrimination — three colleges for women, and 21 for men. Women had only been allowed to take degrees 15 years earlier. Before that they could take the Tripos examinations and know their results but had to call themselves BA (tit) — for titular.

I had low expectations of myself when I went. I expected to be a small fish in a big pond, to get an average degree and return to the north to become a solicitor in a small-to-medium sized firm. In fact, much to my surprise, I got first class marks in all three years. That, plus encountering confident — even arrogant — young men with a profound sense of their own entitlement to top jobs, but with no more legal aptitude than mine, changed my ambitions. But I still didn't think of becoming a judge.

This would not have been realistic. The Sex Disqualification (Removal) Act 1919 had enabled women to join the legal profession, previously denied to them, to hold public office and eventually to become judges. But only a handful joined the profession between the First and Second World Wars (on average 16 a year going to Bar). The first woman stipendiary magistrate, Sybil Campbell, was appointed in 1945 — but significantly, magistrates were then appointed by the Home Secretary while judges were appointed by the Lord Chancellor. A handful of women sat as ad hoc deputies in the county courts and quarter sessions and in 1956, Rose Heilbron QC was appointed the first woman Recorder — this was a part-time appointment to preside over the Burnley quarter sessions and I suspect (though I don't know) that the borough rather than the Lord Chancellor was principally responsible for the appointment. Elizabeth Lane QC was the first woman to be appointed a full-time County Court Judge in 1962, the year before I went up to Cambridge. She was promoted to the High Court in 1965, the year before I graduated. She was joined in the High Court by Rose Heilbron in 1974. Both were assigned

to the Family Division, despite both having had very successful Queen's Bench Division practices.

I was put off the Bar by a bad experience when applying to one of the Inns of Court for a scholarship in my first year. I don't blame them for turning me down — I was very immature and had not really thought things through. But I do blame them for giving the scholarship to the son of a High Court judge who eventually got a third class degree. I spent my long vacations working in a small firm of solicitors in Richmond and in a large magic circle firm in London. I didn't really fancy either or doing another round of exams so soon after Tripos.

Those days one could get an Assistant Lectureship in law straight after graduation if you had a good enough degree. I was offered jobs by both Bristol and Manchester Universities. I chose Manchester, partly because they wanted me to take the Bar exams, to do pupillage and to practise part-time. One could do that then — I took a self-tuition correspondence course over the long vacation after my first year of teaching and passed the exams in September 1967. It is much harder and more expensive now — attendance at a course which costs many thousands of pounds is compulsory.

I had to wait until 1969 to be called to the Bar, because I had to eat two years' worth of dinners first — in those days, as well as passing the exams, you qualified by 'keeping term' four times a year for three years, and you 'kept term' by eating three dinners a term in the Inn. (Things are different now — they have to complete 12 educational 'qualifying sessions' at an Inn of Court in addition to taking and passing the Bar Professional Training Course.) After call, I practised part-time at the common law Bar in Manchester — doing small civil, criminal and family cases all over Lancashire and Cheshire. I was the second woman in the Chambers I joined and I am so grateful to her for not drawing up the drawbridge after her or frightening the horses.

I was married by then and eventually I had to choose. My teaching commitments got in the way of my practice and my practice took up the time which should have been devoted to academic research and writing. I chose the University — for three good reasons. First, my first husband had started at the Bar at the same time and was definitely going to stay there. We had already narrowly avoided being on opposite sides of the same case. Second, it seemed a good idea that one of us had a steady salary — University teachers are not paid much but they are paid. And third, we wanted children — which

is much easier to combine with University teaching than with the provincial common law Bar. Our daughter was born in 1973 (so she is 45 this week) and once again I was lucky to be the second woman law lecturer in Manchester to have a child — so the precedent was established that I could have three months' maternity leave and then return to teaching half-time for another three months.

But the 1970s were a time of rapid change. The Equal Pay Act was passed in 1970 and the Sex Discrimination Act in 1975, both to some extent motivated by the European Economic Communities' commitment to sex equality. Other legal developments improved women's status in relation to their husbands and in relation to their children. The Guardianship Act 1973 meant that I had equal rights and authority with my husband. Our Family Law professor then thought that such things did not matter until there was a death or a divorce but of course they matter at any time.

Having chosen an academic career, I certainly had no thought of ever becoming a judge, but I had to get my academic show on the road. Curiously, each of the main things that I did led one way or another to a public appointment.

My first book was on mental health law — written as an easy-read textbook for social workers and psychiatrists who had to put it into practice (but now in its sixth edition and no longer an easy read).³ This led to my first judicial appointment as a presiding member of Mental Health Review Tribunals in 1979, deciding on whether patients should remain detained in hospital.

Then I helped to found a new learned journal, the *Journal of Social Welfare Law* — welfare law was a brand new subject in the egalitarian world of the 1970s. This led to my being appointed a member of the Council on Tribunals in 1980. The Council was a statutory body supervising the myriad administrative tribunals mainly dealing with disputes between citizen and state, as well as planning and other public inquiries. I was there for my expertise in social welfare and mental health law — the lawyer members were much grander QCs.

This is what I think led to a 'tap on the shoulder', inviting me to become an Assistant Recorder in 1982. Assistant Recorders were part-time Judges in the Crown (criminal) and county (civil) courts. Someone in the Lord Chancellor's

3 Brenda Hoggett *Mental Health (Social work and law)* (Sweet & Maxwell, London, 1976).

Department had the bright idea of diversifying the bench — not so much by appointing women but by appointing some professionally qualified academics.

Then I co-authored a large and innovative book of cases and materials on the *Family, Law and Society* in 1982.⁴ I think that this led to my being invited to apply for, and then being appointed to, the post of Law Commissioner in 1984. The Law Commission, as you will know, is a statutory body set up in 1965 to promote the reform of the law — principally then ‘lawyers’ law’, the sort of law which needs modernisation but which government departments don’t want to bother with. This then included family law. I think I made a decent job of that: the Children Act 1989, the Family Law Act 1996 and the Mental Capacity Act 2005 all resulted from the work of my team, plus many other smaller projects. These included a joint project with the criminal law team on *Rape within Marriage*, which I am convinced helped the higher courts to realise that they would not be undermining the institution of marriage by making marital rape a crime.

After more than nine years — during which I had become a full Recorder and a QC — they eventually plucked up courage to invite me to become a High Court Judge in 1994. I was the tenth woman to become a High Court judge, but we had all been assigned to the Family Division, until Ann Ebsworth became the first woman appointed to the Queen’s Bench Division in 1992 and Mary Arden the first woman appointed to the Chancery Division in 1993.

You may have read Ian McEwan’s novel, *The Children Act*. You may even have seen the film starring Emma Thompson, which has just been released. The book gives a reasonable picture of life as a Family Division judge, but the life and death decisions he describes are comparatively rare. It’s mostly taking children away from their families (in practice their mothers), sending runaway mothers back to the Antipodes or wherever else they came from, trying to get reluctant children to see their fathers, trying to get reluctant husbands and fathers to provide for their families, etc, etc.

The stand out example of a case I decided in the Family Division concerned an Australian Aboriginal young man, who had been removed from his mother at birth with a consent form she had signed within two days of giving birth,

4 Brenda Hoggett and David Pearl *The Family, Law and Society: Cases and materials* (Butterworths, London, 1983).

and was then adopted as a young child by an English family. They eventually returned to England, where he had a partner and young child. His Australian family had been able to establish contact with him when he was a young man — the law having swung from one extreme to another. He was killed in a road accident and his English and Australian families were in battle about where he should be buried — in England alongside his adoptive father, where his daughter and her mother could visit the grave, or scattered over the ancestral homeland of his Australian family. What would you have done?

After five years in the High Court I was promoted to the Court of Appeal — the second woman to serve there. Unlike the first, I did not have to fight to be called ‘my lady’ rather than ‘my lord’ — though it is amazing still how many advocates fail to realise that they are addressing a woman, even in my court where we do not wear uniform. Our Court of Appeal is much like yours, a collegiate court where we sit in twos or threes to hear all sorts of cases — family, property, contract, commercial, and public law. But we do have two divisions — civil and criminal — and I only sat in the civil division, although I did a little crime in the Divisional Court.

The stand out examples of cases decided in the Court of Appeal concerned two women who never meant to have a child but became pregnant as result of medical negligence — failure to warn that male sterilisation might not be permanent in one case and a failed female sterilisation in the other. The House of Lords had already decided that having a healthy baby is a blessing and a joy, so that it was not ‘fair, just and reasonable’ for the doctors to have to pay the costs of bringing one up. But what about the extra costs if the baby is disabled? We held unanimously that these could be recovered and the defendants didn’t appeal. I contributed a lengthy account of what having a baby and a child means to a woman — not money but a life-long commitment to care.⁵

So the next case concerned the extra costs if the mother herself was disabled — in that case she was blind — and had sought a sterilisation precisely because she did not feel able to bring up a child. The Court of Appeal, by a majority, held that she could recover the extra costs.⁶ But this time the defendants did appeal. The House of Lords was divided. Three Law Lords said that she could recover; four said that she could not, but that she could have a more than negligible

⁵ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266.

⁶ *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2003] QB 20.

sum — £15,000 — to compensate her for the injury to her bodily integrity and loss of autonomy caused by the negligence.⁷ Their lordships did not refer to my account of this in *Parkinson*, but I think that it must have had some effect.

Not long afterwards, I was promoted to the House of Lords. The appellate committee of the House of Lords was then the top court for the whole United Kingdom, not just England and Wales. Originally any peer could hear and decide a case, whether or not he was legally qualified. But it was established in the mid-19th century that only those who held or had held high judicial office could do so. There were not enough of them to handle the work in the House of Lords and Judicial Committee of the Privy Council, then the top court for the whole of the British Empire. So in 1876 the Appellate Jurisdiction Act created life peers called Lords of Appeal in Ordinary, known as Law Lords.

It took them until 2004 to appoint the first woman Law Lord. In 1876, women were not considered ‘persons’ or able to gain the legal qualifications required, so they could not have been appointed. The Sex Disqualification Removal Act 1919 meant that we could qualify for the professions and public office. But in Viscountess Rhondda’s case in 1922, the House of Lords Committee of Privileges held that a female hereditary peer was not merely disqualified but incapacitated from sitting in the House of Lords. The first woman peers were only allowed under the Life Peerages Act of 1958. Presumably that overrode the contemporary definition of ‘persons’ in the 1876 Act? Anyway, no one has ever challenged my appointment as a Law Lord.

Law Lords were full members of the House and could take part in Parliamentary business if they wanted to. But mostly we did not, except sometimes on legal policy issues. In 2000, the Law Lords issued a self-denying ordinance, saying that they would not take part in matters of strong party political controversy and would also bear in mind that they might disqualify themselves from sitting on a case concerning new legislation. Two of my colleagues disqualified themselves from sitting on three fascinating cases challenging the Hunting Act 2004 because they had voted against it: one case argued that it was not law at all,⁸ another argued that it was contrary to the Human Rights Act 1998, and another argued that it was contrary to the free

7 *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

8 *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

movement of goods and services within the European Union.⁹ These were the most entertaining and possibly the stand-out cases from my time in the Lords — although there was also the famous ‘Belmarsh’ case, holding that the power of the executive to order the indefinite detention of foreign suspected terrorists was incompatible with the Human Rights Act;¹⁰ an asylum case holding that the risk of female genital mutilation was persecution within the meaning of the Refugee Convention;¹¹ and *Miller v Miller*, on the principles governing financial settlements on divorce.¹²

Things changed dramatically under the Constitutional Reform Act 2005.

The first innovation was a new system of judicial appointments. Previously all were made or recommended by the Lord Chancellor — a politician and senior member of cabinet although also a senior lawyer and Head of Judiciary. Senior appointments were made by the traditional ‘tap on the shoulder’ although applications were gradually introduced. He relied heavily on so-called ‘secret soundings’ from serving judges and leaders of the legal profession — a recipe for cloning even if only subconscious. Now all recommendations are made by an independent appointments commission operating transparent procedures based solely on merit. One recommendation is made per vacancy, leaving the Lord Chancellor only three choices — yes, no or please think again — rather than a list from which he or she can choose.

There has been a dramatic increase in gender diversity in the judiciary and there is beginning to be an effect on other dimensions — for example in 2003, less than 10 per cent of the senior judiciary were women; in 2017, 22 per cent in the High Court and 24 per cent of the Court of Appeal were women. Last year we also doubled the number of women in the Supreme Court — from one to two — and we shall have a third next month.

The second innovation was the creation of the Supreme Court. It was always an anomaly that the top court in the UK was a committee of the upper House of Parliament, but there was also a view that we were actually more independent under the umbrella of Parliament than we would be under a different arrangement. All the serving Law Lords moved across Parliament

9 These last two cases were heard together as *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719.

10 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

11 *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412.

12 *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

Square to the former Middlesex Guildhall to become Justices. Now there are only two of us left who can return to the House of Lords when we retire. I missed a feminist trick when it was decided that new Justices would have courtesy titles of Lord or Lady, although not being members of the House of Lords. Their Lordships' wives are still entitled to call themselves 'Lady' whereas our husbands are not entitled to call themselves 'Lord' — an ancient example of discrimination against women.

I was promoted from Justice to Deputy President in 2013 and from Deputy to President last year: on each occasion by an independent appointments commission and a transparent application-based process — a strain but obviously the right thing to do.

The third change was the abolition of the traditional role of the Lord Chancellor as Speaker of the House of Lords, Head of the Judiciary and a senior spending member of the government. It was too complicated to abolish the Lord Chancellor altogether, but he is no longer Speaker or Head of the Judiciary. He no longer has to be a lawyer and as Secretary of State for Justice he has responsibility for prisons and the probation service, as well as the administration of the courts and legal services. As head of a major spending department, he now sits in the House of Commons. He also has a statutory duty to preserve the independence of the judiciary, but some fear that this is not always well understood. The Lord Chancellor did not leap to the defence of the Judges in the High Court when they were labelled 'enemies of the people' by a mass circulation newspaper after their decision in the case of *R (Miller) v Secretary of State for Exiting the European Union* — which was not about whether we should leave the European Union but about the constitutional process for doing so.¹³ (The Mrs Miller in question is the third Mrs Miller, married to the Mr Miller whose second wife brought the claim in the famous family law case of *Miller v Miller*, above.¹⁴)

That was undoubtedly the most important case we have had in the UK Supreme Court but by definition all our cases involve points of law of general public importance. Some of the most difficult involve devolution — whether the Parliaments or governments of Scotland, Wales or Northern Ireland have exceeded the powers granted them by the UK Parliament. A current example

¹³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

¹⁴ *Miller v Miller*, above n 12.

is whether the Scottish Parliament can make its own arrangements for the continuity of European Union law after Brexit or whether the UK's Act must take precedence. Other difficult issues involve human rights — and the proper distribution of power between government, legislature and the courts. A recent example is the Northern Ireland Human Right Commission's challenge to abortion law in Northern Ireland, which is much more restrictive than the current law in Great Britain and the proposed law in the Irish Republic. This led to the curious result that a majority of the Court held that the law was incompatible with the convention rights in three respects (rape, incest and fatal foetal abnormality) but another majority of the Court held that the NIHRC did not have standing to bring the proceedings.¹⁵ And a third stand out case was quite different — what is the meaning of cheating at cards? Does it involve dishonesty? If it does, what is the meaning of dishonesty in criminal law?¹⁶

For a long time, I was different from my fellows in more ways than one. I was the only woman until last year. I was state school educated — and I am not sure that any of the others were, except possibly one Scot, until a Welshman joined us last year. Most went to independent boys' boarding schools. I made my career as an academic and public servant rather than a top barrister — and I'm still alone in that. I specialised in poor folks' law — family, social welfare and equality law — rather than commercial and property law. But this year four out of the 12 began their full-time judicial careers in the Family Division. But I am like the others in that I do not come from a visible minority and I went to Oxbridge — until recently only two of our Justices had not, and one was our Irish Justice, who went to Queen's University Belfast.

So my career has been most unusual. What are the lessons — if any — we can learn from it?

First, I was lucky in my timing. There were plenty of 'first woman' posts still to be had. This was just at the time when the powers-that-be within government were beginning to recognise that the lack of gender diversity was a problem and looking for suitable women to appoint. Things have improved greatly since then but we still have to keep up the pressure — we cannot be complacent and there is much still to be done to ensure that talented women are recognised and appointed.

15 *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14.

16 *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391.

Second, pioneers and role models are important. I have been the second woman as often as I have been the first: the second permanent full-time woman member of the academic staff in the Law Faculty at Manchester University — so the first softened them up and forced them to have a maternity policy; the second woman member of my Manchester chambers — so the first by her quiet competence and good sense did not put them off having another; the second woman Lord Justice of Appeal — so the first had got them used to it and fought the battle to be called ‘my lady’.

Third, we need to be flexible and seize our opportunities when they come along, however great our trepidation about them: it was right to go to Manchester rather than to Bristol, although Bristol is in many ways the more agreeable place, because it gave me the opportunity of going to the Bar as well as some great academic role models; it was right to take up the offer of becoming an assistant recorder even though it was by then ten years since I had been in court; it was right to apply to the Law Commission even though it meant a move to London which had consequences for my family life; and it was right to turn down the suggestion of appointment as a circuit judge and to hold out for the High Court, though I knew some anxious moments when my Law Commission appointment was coming to an end but I didn’t know that the powers that be had already decided to appoint me to the High Court.

Fourth, and hardest of all, we all have to ask ourselves the baby question: whether, when and how? It’s very important that clever young women have children. But it’s very hard to combine a career and motherhood unless you have a lot of support — an understanding work environment, the resources to provide for good childcare, and above all a supportive partner who will not only support you in what you want to do but will also shoulder some of the responsibility himself. But one of my biggest beefs is that our family law should recognise and compensate the sacrifice made by women (or men) who take time off to bear and raise the next generation.

It is an enormous privilege to do the job I now do. It is wonderful to think that for one term last year the top Judges in New Zealand, Canada, Australia and UK were all women — Sian Elias, Beverley McLachlin, Susan Kiefel and me. I try hard to live up to the example set by wonderful women such as Beverley McLachlin in Canada and your own Sian Elias. But Beverley has retired and been replaced by a man. Sian will retire next year. And I shall retire in 2020. Let’s hope that we are not all replaced by men.