

## DISCRIMINATION AGAINST WOMEN IN THE LEGAL PROFESSION – The Bar

1. Please don't think there is no positive discrimination in favour of women at the Bar. Much of what our male colleagues wear is based on court dress in the 18<sup>th</sup> C. So, however it is, it could be a lot worse.

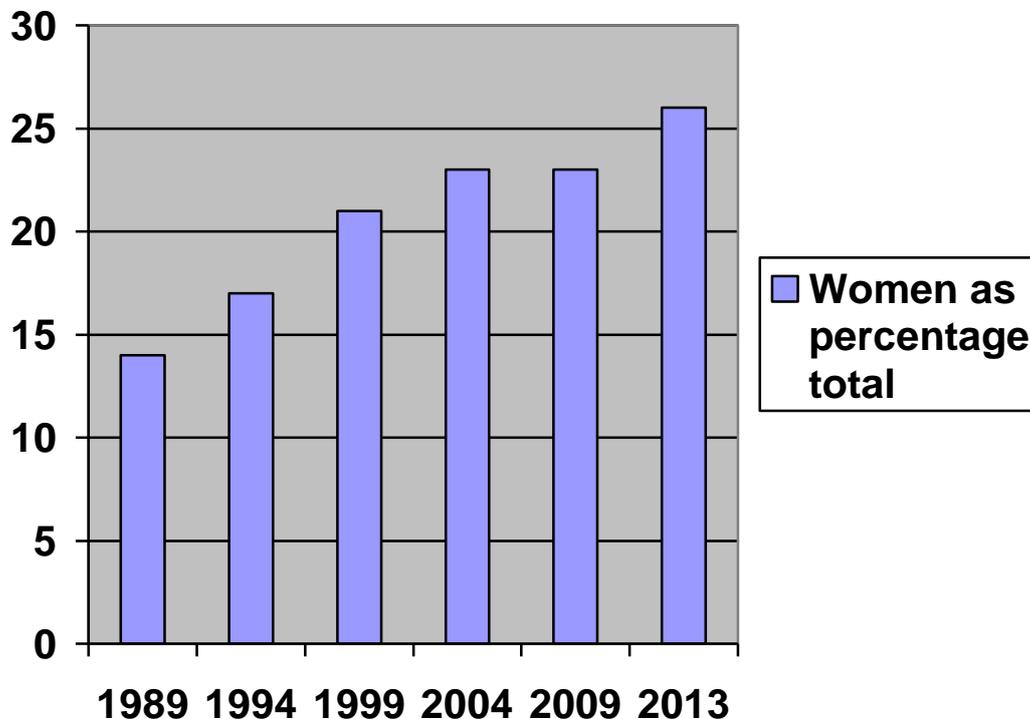
2. First, a couple of disclaimers. Nothing I say represents my taking a poke at any individual. The anecdotes I repeat are all ones told to me, and in that telling, no-one was named.

### INTRODUCTION

3. Don't be alarmed at the reference to anecdotes – I am not in my anecdotage (yet) – but since there are no studies or research on this aspect, I have relied on the tried and tested method, and questioned witnesses. In that exercise I spoke to a range of practitioners, across different areas of law. I spoke to juniors and seniors. I even had some conversations with men.

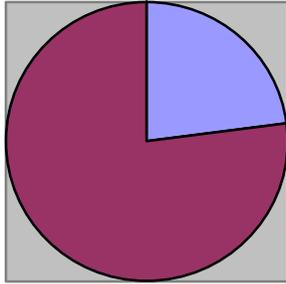
4. I divided my questioning into whether there were systemic issues, and whether there were issues in the instruction of women. The main part of my talk covers what I have learned from these discussions, and some thoughts as to ways forward. Before that though, some statistics on women at the Scottish Bar.

5. I called in 1989. In the 24 years since then, women as a percentage of the practising membership have risen from 14% to 26%. [Today female membership is 118 out of 450].

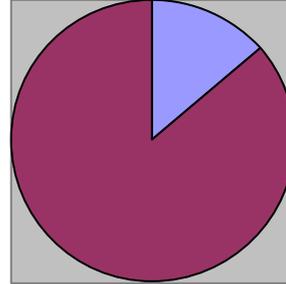


6. How does that break down? At the junior Bar, women make up 30%; for Silks, they are 20 out of 123 – 16%.

Junior Bar – 30%



Senior Bar – 16%



7. Turning to women who are coming to the Bar: currently there are 22 devils of whom 12 are female. This looks like a blip – last year there were 13 devils, of whom only 3 were female. It is difficult to see a pattern in the figures for devils, as there is great fluctuation. As far as the practising membership is concerned, the general picture is that the proportion thins as you move up the Bar. I will come back to that.

#### Now a bit of HISTORY.

8. I would like to pay tribute to our predecessors who opened doors for us. In particular I want to mention three: our own Margaret Kidd and Isobel Sinclair, and also Rose Heilbron in England.

9. Margaret Kidd became a member of the Faculty of Advocates in 1923. She was not the first female at the Bar in the UK – that was Ivy Williams in England in 1922. Ivy Williams never practised, going instead into an academic role.

10. The legal position had recently changed –

#### **Sex Disqualification (Removal) Act 1919**

##### **1. Removal of disqualification on grounds of sex.**

A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise).

11. There was obviously some speculation about possibility of women coming to the Bar – how would they look?

12. Margaret Kidd was educated at Linlithgow Academy and Edinburgh University, and graduated with a law degree in 1922. When she called, she was 23. She did practise, mainly in family law (I will come back to that) and for 25 years she had the title of THE lady advocate – which made me laugh, due to all the angst about what we call ourselves (*lady advocates, female advocates, women advocates, whatever*) and the days when as a woman, if you didn't want "Miss" on your box, you had to have your first name on the brass plate, presumably so that no-one would instruct you by mistake thinking you were a man – well, that is no more.

13. In 1948, Margaret Kidd became the UK's first female Senior Counsel – KC obviously. She was the first woman advocate/barrister to appear before the House of

Lords. She became Sheriff Principal of Dumfries and Galloway, then of Perth and Angus. She was Keeper of the Advocates' Library from 1956 to 1969. She was also an assistant lecturer in public law at Edinburgh University, and was married with a daughter. Margaret Kidd became a Dame; she died in 1989.

14. What must it have been like for her at 23 – and the robing room created was in the basement, opposite the condemned cell, for added encouragement!

15. Rose Heilbron called to the English Bar in 1939. In 1949, she became the first woman to lead in a murder case, when she defended a gangster George Kelly, accused of a fatal shooting. He reportedly said "*I'm not having a Judy defend me*", but he later praised her for her painstaking defence.

16. A passage in Rose Heilbron's Wikipedia entry did amuse me –

"Heilbron's rapid rise apparently was aided by the fact that so many men were in the armed forces during her first six years as a barrister during World War II. Citation needed."

17. We really can't make up our minds!

18. Isobel Sinclair – came to the Scots Bar in 1948. She had been a journalist on the Herald and rose to a high position on the paper during the War (I guess someone might write in Wikipedia that if it hadn't been for the War...). When the men came back, it was assumed that she would be demoted, which she was not prepared to accept.

19. She became the second woman to call to the Scots bar, in 1948. She made it clear that she expected to take lunch in the (male) advocates' lunch room – it is not clear where Margaret Kidd ate her lunch – but was told she would not be allowed to. On the day she called, she marched in and sat down. That was that.

20. There is also a great story (recorded in Ian Hamilton's book) about Isobel Sinclair being discreetly asked not to wear red nail varnish in court, as was her wont... And I have noticed a short article from the Herald in July 1964 reporting that she has taken silk – despite the article using the word "feminist" of her, I think because there is a reference to her enjoyment of spending time with her husband in their holiday house, the article has been headlined "Housewife QC". Maybe the Herald was getting its own back.

21. Whatever happens to any woman today, we do not have anything like the difficulties these pioneers experienced, and we must be thankful for that, especially to them. I also suspect that they were quite different in the way they approached the Male/Female issue, with Isobel Sinclair being more outspoken and Margaret Kidd more quietly determined. In style terms, descendants of both these women can be found in the Faculty today.

So – what does happen to women today?:

22. **Systemic issues** – I am not sure that there is anything of substance there. First, we should leave women with children for a moment. I cannot identify anything about the systems that discriminates against women. Appointment of QCs has been mentioned – yes, there has only been one female QC in each of the last two appointment rounds, but in the last round there were only three female applicants, compared to 27 men, giving a success rate for women nearly double that of men.

(2012 was the first year for which the gender divide for applicants was provided). This sample is obviously too small to be of any statistical significance; the disparity of numbers may involve a lot of factors, but it's not evidence that there is something wrong with the process itself.

23. Thinking now of children – yes, it is probably true that some of the ways the system works disadvantage those who cannot react at short notice because they care for young children. That is as true for male advocates who care for young children as it is for female advocates – of course, there are still more women in that bracket. But there is a whole raft of reasons why there has to be a last minute element sometimes, so I am not persuaded that there is anything very much that can or should be done. Of course, positions which are often filled by advocates during their careers may raise issues in relation to work patterns, and I would hope that people would look at what could be done to make those positions more flexible.

24. But being an advocate is a good job for a woman with young children. Many women have said so to me, and it is my own experience. There is huge potential for home working, (not generally while children are there though) and you can be at home when they return sometimes. You can spend time with children between (say) the end of the afternoon and bedtime. The price of that may be working till midnight or beyond. You also need to have a partner willing to share domestic and childcare tasks, and it helps if that partner has fixed working hours which are not too long. My husband was the first man in the history of Edinburgh University to ask for part time work for family reasons.

25. **The work** - This is not just about the instructions. Let's start with them, however. Women are well-represented in family law and, indeed, other areas where vulnerable people are involved – e.g. the woman who said to me that in medical negligence she thinks she is instructed because it is felt she will be sensitive to the personal issues involved. My law reform project is about adults with incapacity.

26. The stereotyping issue used to trouble me – the assumption when you called that you would want family work (which caused mixed feelings) and not want commercial work (which caused bad feelings). I sense that is not as strong as used to be. But in the end there is only one grown-up answer to this. It is not a problem that vulnerable people have their cases dealt with by women, who can bring sensitivity and attention to detail to that work. It IS a problem if a woman who wants to specialise in corporate insolvency or serious crime can't get such work because of her sex. This is no different from the position if a woman wants to be a fireman or a scaffolder, or do any other job where men predominate.

27. I suspect that there are still assumptions made about what clients want, what work women want to do and what work they are better at doing.

28. Here is a tale from the criminal world. "Sue" told me that she was involved as junior in a complex criminal case. The senior (male) had to pull out before the trial. Solicitor no 1 said to Sue that Sue should just take over the case and they would bring in a junior junior to assist her. Solicitor no 2 – a partner of no 1 – on hearing of this plan said no, we need to get another senior and it needs to be a man. No 2 then explained to Sue that "big criminals (alleged) don't want women". The remarkable thing about that is that solicitor no. 1 was a man and no. 2 was a woman.

29. Three points can be taken from this:

1. It is a mistake to treat this whole topic in a Tarzanoid fashion – “men bad, women good”. Women are as capable of discrimination as men.

2. Someone drew my attention to a comment of Madeleine Albright that there is a special place in hell for women who don't help other women. That is a bit high octane for my taste, and I don't advocate that women should always instruct women or anything as extreme as that. But if we pander to those sorts of attitudes from clients, things will never change. The anecdote mirrors the Rose Heilbron story, but that was 64 years ago! And obviously someone persuaded George Kelly that Rose should be instructed, unlike Sue's experience. And the Law Society do have a Code about these things, not to mention the Equality Act....

3. Having dealt with “women bad” (sometimes) I turn to the third point – men good. When I look back over almost 24 years at the Bar, the most effective support I have had – I use the word effective, to distinguish encouragement, emotional support, morale boosting or all the countless other ways in which women support each other – but effective in terms of giving me a crack at good work, has come from men, including in particular Alan Rodger, who was Lord Advocate when I became a Standing Junior. Men are highly relevant to this topic – so it is a bit disappointing that we reckon there are only 60 of you here.

30. Criminal appeals seem to paint a brighter picture, possibly because of the painstaking attention to detail for which many women become known.

31. Because of the gladiatorial aspect, some people do still think of the job of an advocate as essentially man's work. The attitude is not widespread and, where it occurs, it is usually overcome by the first piece of work the woman does for that person – if she can get it. And solicitors/clients may also be pleasantly surprised by how assertive she can be. Some women are pretty formidable in a conflict. My own keepsake is a remark made to me by a male junior when I was worried I had been a bit too formidable – “female seniors”, he said, “**have** to be a bit scary”.

32. Public law, unsurprisingly, is better. My experience is that I can't think of a single example from the public law sphere where I have felt that discrimination might have been involved.

33. More widely, I have had three occasions in my career where I have been told informally that I am to get a piece of work and then someone else higher up in the organisation giving the work has countermanded that and chosen a man instead. Two of those were commercial work. I will never know why it happened. It could have been because the countermander thought I was useless, or because he didn't know me and he did know the man – we all tend to gravitate to people in our own image (the “cloning” issue). I daresay these things happen to men too. The difficulty is that when there is a substitution like that, you never know if your sex played a part.

34. Let me also record in the interests of balance that one woman said to me “I can't think of a single example of discrimination in my career”. Another said “I am not aware of having faced discrimination because I am female”.

35. The caveat concerning awareness is, of course, necessary because you know nothing of the multi million pound case that was denied to you because you were female.

36. Beyond instructions – advocates progress not just because of their cases. Other parts of the job are important too – being on committees, advisory bodies and so on. One of my witnesses said “meetings are difficult” and I know what she meant. Many women – not by any means all – are more diffident in meetings and may wait for an opportunity to speak which just never comes.

37. Here is a story a man volunteered to me. He was chairing a meeting to discuss four matters. By the end of two hours, they were nearing the end of the second matter and although a number of able women were present, not a single one had said anything. So he announced that at the beginning of the third topic, he would call upon a woman to speak. He said exactly that. “I now call upon a woman to speak”. There was a very long pause. Then one did. He remarked that it altered the whole dynamic – the rest of the women started to join in...So my response to the Madeleine Albright quip is that there is a special place in heaven for men who take trouble to see that women get their turn.

38. Role models is a bit of an issue – who is the female face of the Faculty of Advocates? The Bar Council has had one female chair, the now Lady Justice Hallett, and currently has another, Maura McGowan QC. The Faculty has had female officer bearers – 3 in 90 years. None of them won a contested election. So that I think will be an important milestone.

39. As I conclude, I want to thank all who helped me, sharing their thoughts and experiences, and also Stephanie Brown in Training and Education, Gaynor Adam in the Dean’s Secretariat and Helen Robinson in the library for their help with my research.

40. And, finally, Lady Hale, let me offer to you this reassurance in relation to your earlier point about making enemies by giving talks on this topic. Churchill said “You have enemies? Good. That means you have stood up for something in your life”.

22 March 2013