

An interview with Margaret Cunneen

An interview by Chris O'Donnell

Chris O'Donnell: Margaret thank you for coming along today to be interviewed by *Bar News*. Could you start by telling us a bit about your background, schooling and how it was that you began to study the law?

Margaret Cunneen: I was educated in primary school by the Saint Joseph's nuns, in fairly straitened circumstances, in Belmore and Beverly Hills. We had classes of seventy children in a room, but we learnt in spite of, and perhaps because of, this the dedication of these wonderful women to teaching. Then I went to Santa Sabina at Strathfield, where conditions were a little rosier and I became interested in debating and the humanities. My father often said to me that I should go into law because he found me adept at argument, though I always lost.



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Chris O'Donnell: Was your father a lawyer?

Margaret Cunneen: No he wasn't. He was a civil engineer - the chief commissioner of the Water Resources Commission.

Chris O'Donnell: I was taught by nuns myself in primary school and I found a lot of them quite challenging in a disciplinary way - some very admirable, feisty and independent women. Did you find any role models there yourself?

Margaret Cunneen: Yes, I did really, because at our school at Santa Sabina we had very little involvement by the male gender, so there was nothing that we couldn't do. There wasn't really any talk of men, so that we had to do everything for ourselves and the Dominican nuns always use to say things like: 'when you enter your professions...'

Chris O'Donnell: So it was taken as a given thing?

Margaret Cunneen: That's right, none of this housewife business.

Chris O'Donnell: When did you first decide that you would do law? Was it when you were still at school?

Margaret Cunneen: Yes, I certainly applied to all of the law schools. Fortunately I also applied to a new part-time course, because whilst I did achieve entry into Sydney University and the University of New South Wales, my personal circumstances changed and I had to work full-time.

Chris O'Donnell: Were you where living away from home?

Margaret Cunneen: Yes, that's right. So I applied and took up the offer of the position at the new New South Wales Institute of Technology Law School and on the same day started work as a legal clerk in the ministerial office of the NSW Attorney General's Department.

Chris O'Donnell: Which would have been a very rapid and early start to a legal career.

Margaret Cunneen: Yes, It was somewhat advantageous because I still finished law in five years by carrying extra subjects, but at the same time I worked my way fairly rapidly up the ranks of the administrative and clerical division of the public service.

Chris O'Donnell: And was it a difficult challenge to study at that relatively young age and support yourself through full-time employment?

Margaret Cunneen: Looking back it was, but I had always been a rather hard worker. I had at least two, and sometimes three, part-time jobs all the way through high school as well as going to school, so that I was accustomed to making pretty good use of my time. It was certainly easier working and studying then, than had I waited until I became a mother.

Chris O'Donnell: Yes, indeed. Did you get financial support outside your work, or was it simply a case of studying part-time?

Margaret Cunneen: Yes, we weren't allowed to have any other jobs because we were public servants 24 hours a day.

Chris O'Donnell: What sort of legal experience did you gain in your first position?

Margaret Cunneen: I gained a thorough understanding of all of the courts and worked a lot on the ministerial correspondence concerning legal issues. I had to write submissions to the attorney general giving advice in various areas, so of course I had learn about them first.

Chris O'Donnell: Indeed, so where did your interest in criminal law develop? Was it at that time or at a later stage?

Margaret Cunneen: Not really at that time although I found criminal law very interesting at university, but I went from the Attorney General's Department to the Public Service Board of New South Wales as an industrial officer just before I was admitted as a barrister in 1982. The position involved advocacy in the Industrial Commission and the Government and Related Employees Appeal Tribunal and that was in a sense prosecution work because it involved prosecuting cases of

people charged under the Public Service Act and appearing for the employer in their appeals for reinstatement

Chris O'Donnell: Were these work-related misdemeanors or contraventions of obligations as employees?

Margaret Cunneen: Yes, our greatest customers were psychiatric doctors, nurses and corrective services officers. They seemed to have the scope for getting into the most trouble, particularly senior officers such as psychiatrists in the Health Department. Many people seeking re-instatement had a lot riding on the case, so that they engaged senior counsel to represent them. Thus, very early in my advocacy career, I had the opportunity to be pitted against experienced counsel and I learnt a lot from those years.

Chris O'Donnell: That must have been great experience.

Margaret Cunneen: It was superb experience and it was augmented by the fact that on the Government and Related Employees Appeal Tribunal was a man, it was usually the same person representing the employers' side, who became a great mentor of mine and his name was George Roots, now deceased. George had the habit of coming back after having sat on these appeals and calling me into his office and telling me in no uncertain terms all of the things I did incorrectly.

Chris O'Donnell: In a way to encourage you?

Margaret Cunneen: There was a degree of encouragement because as I started to improve under his tutelage he would remark upon it that I had remembered one of his lessons, but one lesson which he did impress upon me is always to know more about your brief than any one else in the court room.

Chris O'Donnell: As a prosecutor in particular?

Margaret Cunneen: Yes, and so it has always been a case of just diving into that brief and finding out everything that you can about it because you never know when a piece of information, no matter how apparently tangential, will become of assistance in the hearing.

Chris O'Donnell: You must have developed the necessary skills to remember all that information when necessary.

Margaret Cunneen: I haven't had such a problem remembering factual matters because the human element interests me greatly. I rather wish that I had the same facility with remembering case law.

Chris O'Donnell: You can always look that up. Did you find that in that context you got experience in cross-examining as opposed to, for example, addressing?

Margaret Cunneen: I had the opportunity to gain a great deal of experience cross-examining because the chairmen of the tribunals had the view that if a person who was fighting for his or her job did not have the interest or the commitment to get into the witness box and subject him or herself to cross examination, then there was very little chance that they

were re-instated. So I always had the opportunity for cross-examination in those early days, in the 1980s, and that was something that not every one in the criminal law on the prosecution side had at that stage.

Chris O'Donnell: And what was the next major step in your career after that?

Margaret Cunneen: In the mid 1980s, what was called then the Clerk of the Peace Office started to take over the prosecution at committal level of child sexual assault cases. This innovation occurred as a response to a number of developments in the area of child sexual assault prosecutions and it was thought that if a specialist unit was developed within the Clerk of the Peace Office then people from that unit would be more effective in conducting prosecutions from the start with child complainants. Because in those days before changes to the way committal proceedings are conducted it was the rule rather than the exception that complainants gave evidence at committal proceedings.

Chris O'Donnell: So there was no option, that was a requirement?

Margaret Cunneen: Yes, at the defendant's request, and in keeping with the idea that the children would benefit from having a continuity in terms of the lawyer with whom they had developed some kind of rapport. We started doing those committal proceedings at that stage, with a view ideally to having the solicitor who had conducted the committal proceeding then instructing in the trial, if there was one.

Chris O'Donnell: So there was a focus on, if you like, making it easier for the victim to go through the experience once having to give evidence in a trial?

Margaret Cunneen: Yes.

Chris O'Donnell: In the committal as well?

Margaret Cunneen: Yes, it proved often to be a useful practice because it distilled the issues at an early stage, although of course, it's difficult for the victims to give evidence once let alone twice.

Chris O'Donnell: How did you find that work at the time, did you originally find it confronting and difficult?

Margaret Cunneen: Some people take the view that sexual assault prosecutions are very easy or very simple. I often have this repeated to me and there is a particular term which I dislike - 'kiddy sex cases' and that seems to me to be a pejorative term, but I found the work rewarding because as a group of people, victims of crime, assuming they are genuine victims, are in the criminal justice system through no fault of their own. So whilst it's of course essential and very laudable for people accused of crime to have representation and support, I also see a great need for people whose involvement in the system does come through no fault of their own to have support and assistance and to be treated courteously and with a considerable degree of compassion.

Chris O'Donnell: Do you take that to be an important aspect of the crown prosecutor's role, who is conducting the particular trial involving that person?

Margaret Cunneen: I see it as a very important role. It may be largely as a result of a legacy of my having been a career public servant now over 27 years, but I do take public service seriously. I am always mindful that I am paid by the taxpayer and that I represent the community. I have always tried to deal courteously with everyone I meet. I see no reason to drop one's standards for any individual or section of the community. So that is what it comes down to: courtesy and consideration.

Chris O'Donnell: Now in the context of that position you had experience in running trials, I presume?

Margaret Cunneen: As a solicitor, yes. I did follow through to instruct in some of the trials. I also had a significant managerial role in those years in the late 1980s as senior principal solicitor, Advocacy Unit, in what became during those years the Office of the Director of Public Prosecutions and by then I had also completed a Master of Laws Degree, which concentrated largely on criminal law.

Chris O'Donnell: Now after your position there did you move on to the crown prosecutor's position?

Margaret Cunneen: Yes, in 1990.

Chris O'Donnell: What inspired that move?

Margaret Cunneen: I applied for the position and, of course, from time to time, senior solicitors within the ODPP are successful in attaining appointment to the ranks of the crown prosecutors. I was fortunate for that to occur.

Chris O'Donnell: Was it your long-term aspiration to become a crown prosecutor?

Margaret Cunneen: When I arrived at the DPP I started to entertain the aspiration, yes.

Chris O'Donnell: What sort of work did you do to begin with?

Margaret Cunneen: I did the full range of District Court trials. I just received the same work as every one else, although I had a fairly early entrée into the Supreme Court because when I became a crown prosecutor certain types of child sexual assault cases were still being heard in the Supreme Court: cases with a certain gravity involving children under 10. So I started my Supreme Court career very early and it was an easy transition to homicide cases, particularly having done so many committals of persons charged with murder in my previous role. Contrary to some perceptions, I have done all manner of trials, extortions, conspiracies to pervert the course of justice, large drug matters, armed robberies. Of the almost 400 trials that I have done since I've been a crown prosecutor, only about one-third have had anything to do with sexual assault.

Chris O'Donnell: My understanding of the role of a New South Wales crown prosecutor is that it can be a extremely

demanding, because of the number of trials that you get, sometimes at short notice, and sometimes having to pick up a list of trials in a particular court, either in the outlying areas of Sydney or in the country. Did you find yourself literally jumping off the deep end at times there?

Margaret Cunneen: Yes, it was somewhat daunting at times. I spent some time in Campbelltown during the first year that I was a crown prosecutor. The trials were short but you did a lot of them and I also have done some circuits in the country and one has to develop a degree of flexibility and the ability to keep separate in one's mind the various factual situations and be ready to run any of them at very short notice.

Chris O'Donnell: And you have done a significant amount of appeal work as I understand it as well?

Margaret Cunneen: Yes, I've done a few six-month stints in the Court of Criminal Appeal.



Chris O'Donnell: Do you miss Justice Meagher?

Margaret Cunneen: I have only ever appeared before him when he had been sitting as one judge on the Court of Criminal Appeal, so I haven't had a great deal of experience appearing before him. However, I didn't find him any more unusual than the general run of judges.

Chris O'Donnell: In your experience as a crown prosecutor, is it sometimes difficult to balance the rights of the accused against the rights of the victim, particularly in cases where there is a traumatised victim?

Margaret Cunneen: Obviously there is always a tension, but so long as one keeps in mind that one's role is to present the evidence objectively and fairly but firmly then one can still accommodate the rights of the victims.

Chris O'Donnell: I have read a paper that was delivered on 12 February 2003 by Nichols Cowdery QC the New South Wales Director of Public Prosecutions. The paper he gave was about

the conduct of sexual assault trials within a human rights framework. In that paper he refers to a number of possible measures that have been advocated which could, in effect, make it easier for the victims of sexual assault to go through the experience of giving evidence in those trials. One proposal that apparently exists in Sweden is that the victim actually be a party to the proceedings. Do you think that might create more problems here, with our jury system, than it would aid the victim?

Margaret Cunneen: Yes, I don't see any need to introduce a third party into the proceedings. I always explain to complainants that I don't represent them, I represent the community.

Chris O'Donnell: Do complainants generally understand that or do they find it difficult to see the special role that the crown prosecutor has?

Margaret Cunneen: I am sure that they do find it difficult to appreciate that, but I explain to them that they are a witness, no doubt the most important witness, in the trial. That seems to convey to them their position within the framework.

Chris O'Donnell: Some other measures that Mr Cowdery discussed included having hearings in-camera, the use of closed circuit television next to remote court rooms through which evidence can be given, screens in court to separate the complainant from the accused when the complainant is giving evidence and a broader use of non-publication orders. Do you think there is any scope for extending any of those measures when conducting these trials in New South Wales?

Margaret Cunneen: All of those measures are in place to some degree already and have been for a long time, subject, of course, to satisfying the presiding judge that they are available and it is in the interests of justice to use them. I also favour the non-publication of the accused's name or anything which could identify him while he remains of that status. All of those measures or a combination of some of them can be used depending on the circumstances. There are some complainants who don't need any of those measures.

Chris O'Donnell: Because of their personalities or their confidence?

Margaret Cunneen: Yes, their confidence and their ability to convey their meanings and, of course, a well-prepared witness is a more confident witness. We now have in the Office the Director of Public Prosecutions witness assistance service officers who have taken a large burden away from prosecutors of acquainting victims with courtroom set ups, the personnel within court, and of the availability to complainants of a support person.

Chris O'Donnell: Do they play a personal support role as opposed to a supporting role where they might take their witness through the proof of the evidence and that sort of thing?

Margaret Cunneen: They don't touch the evidence because they are not bound by prosecutors' ethics, but they are bound by their own ethics. The way they make sure that the correct procedures are maintained is that they do not traverse the area of the evidence at all, leaving that to the prosecutor to explore in an appropriate way.

Chris O'Donnell: And has that been a well-received development?

Margaret Cunneen: Initially there was a degree of scepticism from some lawyers who represent defence interests, thinking that the witness assistance service people may not behave with propriety. But now I am sure that defence lawyers would much prefer to work alongside the psychologists and social workers from the Office of the Director of Public Prosecutions than those who aren't well acquainted with the ethical constraints.

Chris O'Donnell: Mr Cowdery also referred to the possible introduction of vulnerable witness legislation that might address these and other measures, we've been discussing, to address the imbalances that he thought remained with victims of sexual assault. Do you think there is a need for legislation here or do you think it could be dealt with at a more practical level?

Margaret Cunneen: The accommodations which you listed earlier are already governed by legislation and I can't think of any other means which could be the subject of new legislation. But every case is different. The ideal situation as far as I'm concerned is a complainant who is confident to go into a court room and, without barriers, give evidence to the court and in that way be on an equal footing with other witnesses and with the accused if he or she gives evidence.

Chris O'Donnell: This might sound like a Dorothy Dixier, but what has been your general experience of life at the Bar?

Margaret Cunneen: It's a curious situation for crown prosecutors because we serve several masters and the way that I came to the Bar was by adding my membership of the Bar Association and my obligations as a prosecutor to the other obligations that I already had as a crown employee. We have our Head of Chambers of course - Mr Mark Tedeschi QC - who allocates to each of us the briefs we will prosecute. We have the Director of Public Prosecutions who, in effect, instructs us all. But having been for all of my life used to observing the directions of the department head, he, of course, is someone whose wishes must be observed and so one's obligations as a prosecutor are yet another area to observe and fulfil.

Chris O'Donnell: You have mentioned that as a crown prosecutor you really are a servant of all and of one master. Do you find, for example, that there may be differing expectations between different judges as to how a prosecutor should behave - for example with the degree of firmness in which submissions are made or a cross-examination is conducted?

Margaret Cunneen: Yes, it seems to me that prosecutors are treated almost with contempt by some small sections of the legal profession. This is rather difficult to cope with in a job which has confrontation as part of its very nature.

Chris O'Donnell: The serial conduct of criminal trials?

'I would hope that measures designed to advantage women would have a twilight clause in them'

Margaret Cunneen: Yes, there is that aspect. But then if one is also fighting a battle against people who don't like you because they think that you are some kind of jumped-up policeman, then that makes things altogether more difficult. Certainly a degree of restraint is required of prosecutors which is not required of other advocates and, generally speaking, that is fairly easy to maintain because it becomes a habit to choose one's words carefully.

Chris O'Donnell: Do you feel occasionally that you are stepping across a minefield of conflicting expectations and duties?

Margaret Cunneen: Yes, that does not mean a prosecutor must be bland or timorous, which could itself be failing in one's ethical responsibility.

Chris O'Donnell: To prosecute effectively?

Margaret Cunneen: To prosecute effectively.

Chris O'Donnell: Particularly in context of a jury trial?

Margaret Cunneen: Yes. Of course jury advocacy requires some firmness, particularly when one is trying to meet enthusiastic advocacy on the other side. But so long as the tone is measured and the content is objective then that is something which can easily be done.

Chris O'Donnell: Now, have you found gender to be an issue at the Bar? For example are there disadvantages do you think faced by women barristers in general with say solicitors, other barristers, judges, juries and the clients?

Margaret Cunneen: Like every other area of life, things have improved for women over the course of the time that I have been at work. That is for certain, because when I first started work in the law in the mid 1970s, many people were surprised that I was bothering to study law at all, because it was thought that women just dropped out and had children and that was the end of it. So things have improved an enormous amount, so much so, that I really don't notice any difficulties being a woman at the Bar or perhaps I just got used to life with that particular qualification.

Chris O'Donnell: There was a recent comment by the President of the Bar Association Mr Ian Harrison SC. It got a

little publicity and you're no doubt familiar with it but I will remind you of it:

Advocacy is at its purest, an intellectual exercise where hormones and chromosomes have no relevance. I continue to be troubled by the notion that the fight to equalize opportunities for women at the Bar so often starts with propositions that they are a separate group. I consider that equalizing levels of representation should be a goal which drives the debate.

Do you agree with any aspect of that comment ?

Margaret Cunneen: Yes, I respectfully do agree with Mr Harrison's statement. In fact when I heard it I thought it was refreshing. It's idealistic, of course, and I have often wished to abide in work places where hormones and chromosomes have no relevance. I have a profound belief that women can do anything in this life and if we just get on and do it then every one else will be singularly convinced. I would hope that measures designed to advantage women would have a twilight clause in them, because it is to be hoped that we are working towards, and very rapidly towards, the time when women have precisely the same opportunities and are given the same level of acceptance and respect by other men and by other women in every area. I am quite sure that at the Bar women are better off than in work places where people don't have the benefit of such high levels of education. So I don't see it as a particularly difficult handicap in my profession.

Chris O'Donnell: And you, of course, are lucky to have three teenage boys. Did you find it difficult, particularly when your children were young, to balance professional life with family life?

Margaret Cunneen: It was a cataclysmic experience having a very intensive period of motherhood. I had three children in just over three years spanning the time when I became a crown prosecutor, and I was concerned that some people probably thought I was completely stupid. But it was at that time I realised the benefit of maternity leave. There is a short time when motherhood, sleepless nights and breast feeding make you a little less than you are used to being. You may lose confidence and feel that one's brain power may never be back to the level it was before having children. So it's a marvelous thing to have a job to go back to, in which you have already proved yourself, without having to apply for it again. One also learns from one's children and from the things that they learn. The motto of my sons' house at school is *Audere egregia* and that has currency for me.

Chris O'Donnell: As a father I wonder whether one gets the brain power back if one had it in the first place, but it's good to hear that parenthood and life at the Bar are not mutually inconsistent or incompatible. In terms of your recent practice, you've run a series of very high profile cases that have attracted a lot of media attention. Have you found that difficult to deal with professionally or personally?

Margaret Cunneen: I didn't feel that it was difficult at the time but I am currently doing a series of anonymous cases that don't seem to carry the same degree of stress because, of course, whatever way the cards fall, publicity does give people the chance to criticise you for something and that does add an extra degree of stress to any case. Some of the sexual assault matters which I have prosecuted have been attended by extensive publicity and I have been surprised to hear that I have been thought by some people who don't know me to have somehow encouraged it. The press turns up when the press wants to turn up. The press has not been interested in 90 per cent of the murder trials I have done. The press was however very interested in my prosecution in Queensland of a magistrate for a rather more minor matter. There is nothing that a prosecutor can do either to encourage or dissuade the press. Some advocates may be more daunted by the pressure of publicity at the time for fear of losing in public as it were. But fortunately at the crown we never win or lose. Justice is simply done so that we never have to have that fear. Disinterest is a comfortable state.

Chris O'Donnell: Do you find that to be a satisfactory place to be in the framework of the legal system?

Margaret Cunneen: Being a crown prosecutor is a very satisfying position because it does bring with it a real sense of service, which is extremely rewarding.

Chris O'Donnell: And what lies ahead for you Margaret?

Margaret Cunneen: I am very happy with the position that I now hold: 'Deputy Senior Crown Prosecutor'. I'm very content

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with the work that I have and the wonderful friends in the chambers in which I work. Messrs Cowdery and Tedeschi are enormously talented in their respective roles and they have been extremely supportive of me. So I feel that I can serve the public in this role better than in any other role and am perfectly happy for it to continue. I am in the old, old superannuation scheme so that will hold me in good stead for retirement.

Chris O'Donnell: Is that as good as the one that the present federal parliamentarians used to enjoy?

Margaret Cunneen: I am sure it's not but it's as good as a public servant can get.

Chris O'Donnell: And ever hope to get.

Margaret Cunneen: That's right, so they will have me on the books until the statutory retirement age of 60 in 14 and a bit years time.

Chris O'Donnell: Alright thank you very much Margaret.

Margaret Cunneen: Thank you very much Chris.

The breadwinner

By Michelle Painter

I came to the Bar in February 1998, having practised as a solicitor for seven years. Coming to the Bar meant a move from Canberra to Sydney and a change in job for my partner. We arrived in Sydney a week before the Bar Practice Course started and moved into our rented house. My work with the Attorney-General's Department in Canberra had been in trade practices - my only client was the ACCC - and as a consequence the only jurisdiction with which I was familiar was the Federal Court. You can imagine my dismay when I first encountered a Friday morning motions list at the District Court!

I read with Paddy Bergin and with Tim Castle, and initially occupied 9 Selborne's reader's room in the National Dispute Centre. I then licensed on 7 Wentworth, where I was privileged

to occupy Bob Stitt's magnificent chambers for a time. In about my third year I purchased chambers on 8 Wentworth and was there for a couple of very happy and productive years before moving over the road to 6th & 7th Floor, St James' Hall Chambers.

One of the things which I have tried very hard to achieve is a semblance of balance of work, family and leisure. Too often this balance is viewed as important only to families with children, but I am firmly of the view that having a happy and rewarding life outside of work is important to all of us, whether parents or not. It also calls into question the nature of family. I don't accept that a family must consist of the traditional unit of mother, father and children.