



Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

**Police Ombudsman Investigation Report:
Tony McCusker**

30 June 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Ms Jennifer McCann
Mr Basil McCrea
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witness:

Mr Tony McCusker

The Chairperson:

Welcome to the Committee, Mr McCusker. I invite you to outline the findings of your report on the allegations regarding the role of the Department of Justice (DOJ) in the Office of the Police Ombudsman.

Mr Tony McCusker:

Thank you for inviting me to the meeting today, Chairman. On 19 April, the Minister of Justice asked me to conduct a review. In summary, the terms of reference that he gave to me were to review whether officials had interfered and meddled in the affairs and governance of the Office of the Police Ombudsman, and whether officials had made false and malicious allegations against its

chief executive.

The allegations were contained in a letter that the chief executive sent to the permanent secretary in the Department of Justice and as part of his resignation letter to the Police Ombudsman. After discussion with the chief executive, I found that those allegations boiled down to six broad areas: first, the appointment of the current ombudsman; secondly, expenses, allowances and hospitality allowances for the ombudsman and some senior staff; thirdly, the five-year statutory review, which had been prepared by the previous ombudsman; fourthly, the grading of senior staff; fifthly, the business case in which the office was involved on support for historical cases; and sixthly, the relationship between the Office of the Police Ombudsman and the PSNI, particularly to do with the management of intelligence.

With regard to the sixth point, Chairman, a couple of days after I had been given the brief and before the issue had really surfaced, the ombudsman invited the Criminal Justice Inspection Northern Ireland (CJINI) to undertake a review of that area. After discussions between CJINI and me, we agreed that that area would fall under the scope of its investigation, and its author's report will come forward at a future date.

I will make two points at the outset. First, I will put the allegations in context: the chief executive's allegations related to the functionality of the office, not to the business of the office — that is, the investigations. That was made quite clear in his letter. It was also made clear during our discussions that he was not alleging that the Department, or previously the Northern Ireland Office (NIO), had interfered in the investigative work of the ombudsman. I want to make that point clear, because I think that there were various misinterpretations in the reporting subsequent to my appointment about the terms of reference under which I was appointed.

The second point relates to an annex to the report. I have given to members copies of the statutory position of the ombudsman's office, as well as details of the management statement between the office and the Department of Justice. I want to make the point that, under that management statement, the Department has significant powers of intervention. That is not in the sense of the functionality of the office; the Department is completely at arm's length. It has powers in the sense that it reports to the legislature — the Assembly — on the performance, and particularly the financial performance, of that office.

I will quickly go through the main points of the report, after which I will take questions. As I said, the allegations were made by the chief executive in his letter to the permanent secretary. I have quoted in the report that particular part of that letter. In the discussions that I had with the chief executive shortly after my appointment, he outlined the other areas of concern.

The methodology was fairly straightforward. It essentially took the form of huge volumes of paper — my living room is coming down with paper at the moment — and an extensive number of interviews and conversations with people, particularly the chief executive. The first issue that the chief executive raised concerned the appointment of the current ombudsman. Strictly speaking, that was outside the terms of reference that I had been given by the Department and the Minister. However, the issue of whether the chief executive had been ignored in the process was one for me to consider.

I mentioned the various points that I have covered and the papers that I have looked at. Although the chief executive has serious issues around the appointment of the current ombudsman, the specific issue of his role vis-à-vis the Department seemed not to be one of significant interference by the Department; it was the normal process that the Department would go through to make senior appointments. There was clear evidence that the outgoing ombudsman and the chief executive were consulted about the terms and job specification for the post.

One issue that I have raised as a concern was, partly, that the relationship had broken down to some extent, or at least was frosty. In my view, the financial package that was agreed for the ombudsman should have been the subject of significantly more discussion with the chief executive, given that he would have to be the accounting officer for it. A significant number of issues, about which I will not go into in detail, were raised in that regard because of the chief executive's role as the accounting officer.

The second issue concerned allowances and hospitality. The chief executive raised concerns about the ombudsman's travel expenses and hospitality costs and how those were dealt with by the NIO at that stage. There had been no hint of that in the initial allegations. In the report, I have set out the various requirements of the chief executive and the ombudsman with regard to probity and regularity of expenditure. The issue arose on foot of some press concern about the ombudsman's expenses in his previous role as the Oversight Commissioner. There were some concerns in the office and in the Department about some of the expenditure on overseas trips and

hospitality. That was dealt with following a conversation between the chief executive and a senior NIO official. In my view, it was probably dealt with in the right way by alerting the ombudsman to concerns about his expenditure, but making the point that some issues, taken out of context, could lead to serious questions about regularity and significant media questions that would undermine confidence in the office.

The third issue was the five-year review, which is a statutory requirement and which had been prepared by the previous ombudsman. It contained 26 recommendations. There was an interregnum in the handover from the previous ombudsman to the current one. The decision was taken that there would be a second, further consultation, based on the views of the incoming ombudsman. In my review of the papers, it was clear that the ombudsman's initial position on the five-year review was clearly quite supportive. By my count, he signalled support for 19 of the 26 recommendations. There were various delays in bringing the exercise to a conclusion, partly because of the further consultation and partly because there had been an indication that things had been delayed in order to see what the outcome of the Eames/Bradley group's review would bring.

In any event, it came to a head in June 2009, and a small group was appointed to oversee the conclusion of that. It seems to be fairly clear that the understanding was that the thing had gone on for so long that it was almost time to prepare the second five-year review. Therefore, the easiest way to deal with it was to deal with the specific recommendations on which there was agreement, but also to roll into the second five-year review those recommendations on which there was no consensus. The way in which that was subsequently dealt with seems to me to be extremely odd. It seemed to move very rapidly from that point to one at which there was a signed document between the office and the Northern Ireland Office setting out a rationale for rejecting most of the recommendations, without any hint of recommendations being rolled over to the next review.

Secondly, on the same day as that document was signed, a submission went to the Minister which set out specifically what was, essentially, the ombudsman's view, and I quoted from that in the report. However, according to the ombudsman, he did not know anything about that. He said that he had neither seen the submission nor been consulted about the final document agreed between his office and the Northern Ireland Office. All that struck me as extremely odd. The senior officials in the Department were clear that they understood that the senior official from the ombudsman's office, who was the senior director of investigations, was representing the views of

the ombudsman. That remains in some dispute. However, my view was that, when that was discovered towards the end of 2009, it would have been reasonable for the ombudsman and the Department to look critically at what had happened and learn some lessons on how to deal with those issues in future.

I cannot go any further than that, because there is no evidence of systemic authority in the senior level of the Department that instructions were given on that. I think that it was just something that dropped off the edge, and people did not pick it up in time. However, the significant issue in the presentation of the submission to the Minister and the agreed document was that it seemed odd, because it was agreed between the senior director of investigations in the ombudsman's office and a middle-ranking official in the Northern Ireland Office — I think that I said originally that it was a relatively junior official, but I changed that to a middle-ranking official. That seemed odd.

As I said in the report, the job evaluation was probably the most toxic issue in the whole investigation. In some ways, you could not script how it all played out. I am sure that you have had a chance to read it. The evaluation arose from the position of the previous ombudsman, which was that the senior posts in the office should be looked at and, in her view and that of the chief executive, regraded. Their view was that the senior positions, of directors in the office, should be reviewed.

There was a long lead-in to it and many very sniping e-mails between the Northern Ireland Office and the Department of Finance and Personnel (DFP). Eventually, however, the work was undertaken by DFP consultants. As often happens in those cases, the results were not what people expected. None of the senior directors was recommended for upgrading. In fact, they were found to be in the middle of their existing grades, and one post was even recommended for downgrading. The senior director's position was confirmed as a grade 3, which led to major difficulties. The position of the chief executive was confirmed as a grade 5, which meant that the senior director was senior in rank to the chief executive, and that led to a whole series of events: e-mails, counter e-mails, and so forth.

I set out the various episodes that arose from that evaluation and how it was handled. My view was that it was not well handled by the ombudsman's office, the ombudsman himself or the Department of Finance and Personnel. There were very delicate issues regarding people's

positions, and it struck me that it should have been handled much better.

However, in the middle of it all, and at the centre of the chief executive's allegations about false and malicious allegations against him, was a note or a short report prepared by DFP officials following their meeting with the chief executive. They had arranged a meeting with the chief executive to present their findings. By all accounts, that was a difficult meeting, and different interpretations of it exist. In any event, following a conversation between an official in the Northern Ireland Office and DFP officials, they were asked to produce a report. That report set out graphically what they believed had happened at the meeting. However, the final paragraph went on to raise some issues, as I mentioned, about the health of the chief executive and his potential danger to junior staff in the office. That was the core of the chief executive's issue with the allegations.

Several things that came out of that concern me. One is the position of the senior director of investigations, who used that particular issue in his grievance case against the chief executive, and his position changed several times during the process. An investigator was brought in to undertake the grievance investigations. The investigator's report quite clearly states that the senior director of investigations said that he had been shown a copy of this report by an official in the Northern Ireland Office — I can get the dates from the Department of Justice. When I wrote my first draft, he challenged me on that and said that it was not true. I said that it reflected what was said in the investigator's report and that, when he submitted his grievance procedure shortly after that, he had raised those issues in it. He then came back to me and said that he had lied to the investigating officer. He gave his reasons, which I quote in the report. It struck me as strange and disturbing that a senior director of investigations would state publicly that he had lied to another investigation.

Towards the end of that long sequence, I set out my views. I said clearly that this issue was badly run, by the office itself and by the management leadership of the ombudsman. However, there was no specific evidence that the NIO, or subsequently the DOJ, sought to influence that work. There is no evidence on paper that that happened. I have given my view on how the evaluation was organised, and so forth. I thought that it could have been done much better. I also set out my views on the position of the senior director of investigations. I viewed that with extreme concern, and I indicated that that should be a matter for the ombudsman to consider carefully on the return to work of the senior director of investigations, who has been on sick leave

for some time.

The next issue was the business case for historical issues, to which I set out the background. Essentially, that was the office's bidding for resources to undertake investigations into historical cases, which continue to be a huge drain on the resources of the office. To be honest, I received conflicting views. The chief executive alleged that the NIO and then the Department of Justice had employed delaying tactics. However, the director in charge of historical cases told me that it was, in fact, the fault of the office, because its capacity and ability to complete business cases was somewhat limited and, therefore, much of the fault should fall its way. Again, there is no great evidence that there was a systemic decision by the Department to withhold resources. The Committee will probably want to ask the Minister, but, as far as I know, that has now been resolved and resources made available for historical cases.

The fifth item relates to the PSNI and will be dealt with by Criminal Justice Inspection. I have set out my conclusions in summary form. Again, I repeat that I have not discovered any evidence of systemic interference. I state that a number of issues gave cause for concern. I include the outcome of the five-year review and the consequences of the job evaluation. I have given you my thoughts on the five-year review, the regrading review and the serious issues that arose from that.

Also in that section, I outline my thoughts on governance problems. There are issues about how the office is structured and governed. It has an unusual corporation sole model of governance, which means that the ombudsman is, essentially, the board. That raises questions of how one organises the structures of the office and means that the functionality of the organisation and its core issue can become distorted. Essentially, the chief executive viewed his role as being much wider than just running the office, and, in the management statement agreed between the Department and the ombudsman, the impression is given that he had a wider role through his giving of advice to the ombudsman. There are also issues about the relative seniority of the two posts. The ombudsman's view was that there was little to choose between them. However, the outcome of the grading review, which recommended that the post of senior director be seen as the more senior, brought that issue into sharp relief.

There is a broad rule in the management of public or private bodies — the 80/20 rule. That means that you spend approximately 20% of your time running the office and 80% of your time focused on the business of the office. When that becomes seriously distorted and you spend more

time on the functioning of the office as opposed to the business of the office, there are serious issues of concern. My concern, which I raised in the report, is that, for the past year or more, the priority given to running the office, as against that given to the core business of the office, may have been seriously compromised. I set out issues about various consultants' reports. Indeed, the place is coming down with consultants' reports, which is usually a good sign that an office is not terribly clear about the direction in which it is going.

In the final part of the report, I make two recommendations, the first of which is that the office clearly needs support with its functionality and governance to help it through these difficult times, and, particularly, to get it to a position in which the recruitment of the next chief executive can be carried out with some confidence. I also made a specific recommendation that, given the history of the office, it would not be a bad idea to start planning reasonably soon for the next term of office and the way in which that would operate. Decisions need to be made about whether the office retains the corporation sole form of governance and whether someone with previous police experience should be allowed to apply for the ombudsman role. When I looked at how similar offices function in other jurisdictions, it was clear that, although the Independent Police Complaints Commission (IPCC) and its counterpart in the Republic of Ireland do not, as far as I am aware, statutorily exclude those with former police experience, candidates with such experience were generally excluded. However, those issues need to be considered by the Department and the Assembly in due course.

The Chairperson:

Mr McCusker, thank you for taking us through your briefing paper. Committee members will have had the chance to look at the wider detail that it contains. The fact that such a breakdown in relationships could hardly be scripted seems to reflect a very sorry saga. Was it fundamentally a breakdown of relationships and personality clashes that led to the office — from all accounts — becoming dysfunctional?

Mr McCusker:

In due course, you will probably hear several views on that. I hesitated in using the term “dysfunctionality” in the report, but, when you review the sorts of things that were happening, that assessment would probably not be a million miles away.

In the report, I comment that it is very difficult to run an office in which the three most senior

people are either at loggerheads with one another or have absolutely no respect for one another. Furthermore, to expect a large group of staff to function and deliver a strong service in that environment is a big ask. It is clear from my discussions with various members of staff that they are fairly evenly split between those who supported the chief executive in his trials and tribulations, those who backed the senior director of investigations and those who indicated that they had no confidence in the ombudsman.

The Chairperson:

I note that you have not used the word “dysfunctional”, but my reading of the report would lead me to that conclusion. Would that dysfunctional office have had a negative impact on the investigative role that the ombudsman would have been carrying out?

Mr McCusker:

I am hoping that Michael Maguire’s report will pick that up, because I did not analyse the investigative side of the work. Dr Maguire’s report will have to make a judgement about how that work has been taken forward, the quality of that work and the thoroughness of the investigation. I think that it will also have to take into account whether what was happening in the wider office was impacting on that particular part of it. That was a period when senior people had been off sick for some time and senior directors were still off sick. A lot of stuff was happening that was taking people’s minds away from the core business.

The Chairperson:

One of the report’s conclusions is that you felt that the Department of Justice could have done more in respect of its management role and that the Minister could have done more. Is that correct? That is my reading of your conclusions.

Mr McCusker:

I said that, in my view, they probably should have intervened before now. Equally, because of the sensitivities around the independence and role of the ombudsman, I can understand why there is a reluctance to intervene and a tendency to step back a little bit. My overall conclusion was that they probably should have intervened more, particularly as the issue of regrading was going off the rails.

The Chairperson:

Did they bury their heads in the sand in relation to the problem and not want to face up to it?

Mr McCusker:

I would not offer a view on that. They should have taken it, but they decided to stand back.

Mr McCartney:

Thank you for your presentation. I am trying to understand the process. The two broad remits are in the report. The first was to review whether:

“Officials have interfered and meddled in the affairs and governance of the Office”.

I will not read out paragraphs 38 and 39, but in them you say very clearly that, in your opinion, there was clear interference. I expected the conclusions to reflect your terms of reference. The first conclusion says:

“I have not discovered any evidence of systemic interference or meddling by DOJ officials in the governance and functioning of the Office.”

It was not part of your remit to find out whether it was systemic; is that right?

Mr McCusker:

It is not in the terms of reference, but I interpret my brief fairly widely. The expectation would have been that I would examine whether that permeated the entire office.

Mr McCartney:

I understand that, but the specific term of reference is not answered in your conclusion. I would have expected, given the terms of reference, that your conclusion would have said very clearly that, in your opinion, officials have interfered and meddled in the affairs and governance of the office. To put in “systemic” is like creating a sideshow. You were not asked whether it was systemic, so I cannot understand why it is in your conclusions.

Mr McCusker:

In a sense, the chief executive was effectively saying that it permeated right to senior level, and I was dealing with that as well. Let us take the specific issues that were raised in the allegations. At the outset, I could have said to the chief executive, “These were not raised in your letter, so I am not looking at them.” However, I did not do that; I took them on.

Mr McCartney:

Your terms of reference were not set by the chief executive.

Mr McCusker:

No, but, equally, I could have used the argument that the chief executive —

Mr McCartney:

It is fine; we can use whatever argument we please in particular circumstances. Your terms of reference were clearly to find out whether officials had interfered and meddled in the affairs and governance of the office. In your conclusions, that is not clear, but, in paragraphs 38 and 39, you state clearly that there was interference. Your conclusions do not flag that up.

Mr McCusker:

I take what you say.

Mr McCartney:

When you say that you take what I say, what does that mean?

Mr McCusker:

I have said what I said earlier in the report, and I have said what I said there. If you argue that, technically, I should have had another conclusion point saying that there was interference by some officials —

Mr McCartney:

But that is your terms of reference. I am not making this up. If someone asked me to find out whether officials had interfered and meddled in the affairs and governance of the office, the answer would be yes or no.

Mr McCusker:

This would have related to one official.

Mr McCartney:

Whatever you are going to say about it, that conclusion does not reflect the terms of reference. That is the point that I am making and I want you to accept that. So, are you wrong in making

that conclusion?

Mr McCusker:

On that conclusion, I am not wrong in terms of my definition of systemic interference.

Mr McCartney:

But you were not asked to do that.

Mr McCusker:

I am telling you what I did. What I did was set out that there was, in my view, interference on one occasion.

Mr McCartney:

Where is that in the conclusions?

Mr McCusker:

I accept what you say: that is not in the conclusions.

Mr McCartney:

So you are asked to do something, there are terms of reference, and you ignored them.

Mr McCusker:

No. From the balance of the report, you cannot argue that I have ignored the point that you are making.

Mr McCartney:

No, but you ignored it in your conclusions, so anybody who reads the report will say that there was no systemic interference. You were not asked to ascertain whether it was systemic; you were asked whether there was interference. It is very simple.

Mr McCusker:

That is all right, but I have written a view. If that is OK, I will accept that.

Mr McCartney:

But what are you accepting?

Mr McCusker:

What?

Mr McCartney:

What are you accepting?

Mr McCusker:

I have said what I said in my —

Mr McCartney:

Did you fail to do your job? Are you accepting that you failed to do your job?

Mr McCartney:

If you are going to argue that I failed to do my job —

Mr McCartney:

No, I am asking you a question.

Mr McCusker:

I do not agree that I failed to do my job. I think that I investigated —

Mr McCartney:

I will put it again in the simplest terms that I can. Your terms of reference included investigating whether:

“Officials have interfered and meddled in the affairs and governance of the Office”.

You state that to be the case in paragraphs 38 and 39, but where is that in the report’s conclusions?

Mr McCusker:

I cannot argue any further. I said what I said in those paragraphs, and I said what I said in the conclusions. I was simply making the point that evidence in relation to one person did not

amount to systemic intervention by the Department, which was essentially what the chief executive had alleged.

Mr McCartney:

But the chief executive did not set your terms of reference; OK? You were asked —

Mr McCusker:

Yes, but the chief executive made the allegations. I was asked —

Mr McCartney:

Tony, you were asked to do a specific piece of work.

Mr McCusker:

Yes. The chief executive made the allegations, and all I looked at were the allegations, on which I reported.

Mr McCartney:

We have laboured that point and I do not want to do so any more.

What were the circumstances in which the permanent secretary furnished you with documents around the recruiting procedure when that issue was not in your terms of reference?

Mr McCusker:

Sorry?

Mr McCartney:

Paragraph 14.

Mr McCusker:

Again, I was —

Mr McCartney:

That was not part of your terms of reference. You said:

“It is not part of the brief to explore the circumstances surrounding the appointment of the current Ombudsman.”

You then go on to make a statement of fact, which is that you were:

“presented with papers by the Permanent Secretary, who was a member of the selection panel, which demonstrates that no requirement relating to Northern Ireland experience was introduced at any time and he further assured me that two of the 5 candidates short listed for interview did not have such experience.”

Given that that was not part of your brief, what were the circumstances in which that happened?

Mr McCusker:

Again, the circumstances related to the specific allegations that the chief executive made, and I was looking at his allegations.

Mr McCartney:

I will make this point again because I may not be making myself clear. Your lead sentence states that it is not part of your brief. You then inform us that you were:

“presented with papers by the Permanent Secretary”.

What were the circumstances in which they were presented?

Mr McCusker:

I asked him.

Mr McCartney:

You asked him?

Mr McCusker:

The chief executive made that point to me and I asked him for clarification on it.

Mr McCartney:

OK. Were you assured that you got all of the papers?

Mr McCusker:

At the end of the day, the Department and the official concerned will have to stand over that.

Mr McCartney:

It may be down to presentation, but that does not read to me that you asked him. That is why I ask the question.

Mr McCusker:

Well —

Mr McCartney:

Saying:

“I have ... been presented with papers”

does not strike me as implying that you asked for them, but I am not going to question that any more.

Mr McCusker:

Let me assure you that I did ask for them. I raised the issue with him.

Mr McCartney:

Perhaps that should be clear in the report.

Mr McCusker:

OK.

Mr McCartney:

The other question is that two of the people who were recruited spoke to the Committee for the Administration of Justice (CAJ) about this, and one of them said that he was told verbally that, after the applications closed, there was what he called a Northern Ireland clause put in. Did you speak to that person?

Mr McCusker:

One of them contacted me and told me that they had been approached by the consultants running the recruitment.

Mr McCartney:

And have you referred to that?

Mr McCusker:

It is referred to in that.

Mr McCartney:

How did you go back? Did you ask the permanent secretary for a view on that?

Mr McCusker:

I was aware of that particular point because it had also been raised with me in my discussions with CAJ representatives.

I asked their view and their position was that that was not the case. At the end of the day, it is for them to defend their role in that issue.

Mr McCartney:

Have you included in your paper that you asked the permanent secretary? Will you point that out? I cannot find it. We got the report late last night, and that is another —

Mr McCusker:

I am fairly sure that I do not specifically say that I asked the permanent secretary, but I raised that issue.

Mr McCartney:

My recollection is that you said that you asked the permanent secretary.

Mr McCusker:

I asked loads of questions that are not all covered in the report, but I did ask the permanent secretary about that.

Mr McCartney:

Can I ask you a question now? I am sorry for this, Chair. In relation to the process, this was given to the Department on 16 May, but it did not respond until 12 June. You said that you gave the document in whole or part to various individuals for comment and fact checking. Who were those individuals?

Mr McCusker:

The people referred to in the report: the chief executive, the ombudsman, the senior director of investigations and the officials referred to in it.

Mr McCartney:

Were the draft and final versions of the report tracked for changes? Were many changes made between the draft and final versions?

Mr McCusker:

The report is substantially the same. There were some changes on sequencing; people corrected me on the sequencing of events. Those corrections were made.

Mr McCartney:

I want to say this in conclusion: this is a good report. You have stated very clearly that there was meddling and interference by officials in the office, but I do not think that you flag that up in the way that you should have done. That is my opinion.

Mr Wells:

The Chairman has covered some of what I intended to ask, but I will expand on his comments.

Can the office function properly, given the dreadful bad blood that clearly exists at all levels? Certainly, if it were my office and such allegations were made, it is highly unlikely that I would say, "Well, you are entitled to do it. I have had a full inquiry. I forgive you. Let us continue as normal." Are we not talking about a situation where the work of the office will be clearly impeded by what has developed into quite a nasty series of allegations?

Mr McCusker:

That has probably been the case over the past 12 months. Where it sits at the minute is that the senior director of investigations is not there. His post has been undertaken by someone acting up for the past 12 months or so. The chief executive has now effectively gone from the office. His tenure of office finishes at the end of August, but he is taking leave in the meantime and doing a specific project on behalf of the ombudsman. His deputy is now acting up. The answer to your question is yes, but I suggest that there needs to be some support to get those senior positions sorted out so that the office can get the functioning part of it working properly.

Mr Wells:

You said that various strands within the office have taken sides in the dispute. Do new people not

come in to find that there are camps A, B and C, all at each other's throat?

Mr McCusker:

New people coming in would probably change that. The critical bit in this is the leadership of the ombudsman. How that is taken forward within a unified office is a huge challenge. I have said what I have said about the leadership of the ombudsman over the past 12 months, but it is a huge issue for him to try to unify the office.

Mr A Maginness:

This is a very disturbing report, and also a very sad one. When you read the detail, you come to the conclusion that the divisions and problems that existed in the office were not addressed by the ombudsman himself. Does that not betray a lack of leadership by the ombudsman in his overall duty towards the office?

Mr McCusker:

I cannot disagree with that, and I probably said that in some way in the report.

Mr A Maginness:

As to the detail, there are a couple of things that I cannot understand. I do not understand how a chief executive is effectively on a lower grade than the senior director of investigations. Can you explain that to me?

Mr McCusker:

As I have said in the report, I have not undertaken a review of the grading.

Mr A Maginness:

I will put it another way: does it surprise you?

Mr McCusker:

It surprises me, as I think it surprised the ombudsman.

Mr A Maginness:

And the ombudsman?

Mr McCusker:

I said in the report that the ombudsman did not see much between the two posts. Ironically, that person was brought in at that grade in a competition in which the previous ombudsman and the chief executive were members of the panel. There is an irony in how all of that came about. Although the ombudsman said in his response that he thought that his grade was right, all that has happened subsequently suggests that either he thought that his grade should be higher or that the other grade should be taken down one level.

Mr A Maginness:

I will not go into the substance of the note, but let us call it the malicious note. Was that used against the chief executive in the grievance procedure?

Mr McCusker:

The note was not available for the grievance procedure, but its content was referred to in the process.

Mr A Maginness:

Am I correct in thinking that disciplinary action was taken against the chief executive?

Mr McCusker:

That is right.

Mr A Maginness:

Was that part of the substance of the complaint that was made about the chief executive?

Mr McCusker:

As far as the ombudsman was concerned, the issue was the chief executive's behaviour during the meeting, not the allegations that were made at the end of the note. Therefore, he insisted that he was dealing with the dignity of the office in terms of how the chief executive dealt with people coming to it for a particular purpose.

Mr A Maginness:

The other very disturbing issue is the fact that the director of investigations admitted to lying. He

did so in circumstances where he was trying to put forward a view on the chief executive. Is that correct?

Mr McCusker:

That is essentially correct.

Mr A Maginness:

That is a most serious admission, is it not?

Mr McCusker:

It is serious, and it is hugely strange that he would do that. Effectively, he said that, in an investigation of a grievance procedure that he had initiated, he lied to the investigator to enhance his own case. It is an extraordinary position.

Mr A Maginness:

Did that lie, if we can call it that, form part of the grievance investigation?

Mr McCusker:

At that point, it was not known. In the grievance case, he told the investigator that he was made aware of that document by an official from the Northern Ireland Office, and the investigator took it forward on that basis. The issue of the lie transpired in my investigations only when he queried my first report and said that it was wrong. When I went back to him with the various pieces of evidence on it, he said that it was wrong because he had told a lie to the investigator.

Mr A Maginness:

Was that subsequent to the grievance being investigated?

Mr McCusker:

That was only in the last few weeks.

Mr A Maginness:

In other words, it was after the disciplinary action against the chief executive.

Mr McCusker:

Yes.

Mr A Maginness:

Therefore, could it be that the disciplinary action against the chief executive was based partly or wholly on a false premise?

Mr McCusker:

You need to take the view of the ombudsman. That was probably not the case, because the ombudsman based his case on two other incidents as well, and the decision to take disciplinary action would probably have been upheld.

Ms J McCann:

I will pick up on a couple of points raised earlier about your report's conclusions. Earlier, you said that you found it extremely odd that an agreement on the five-year review appeared to be signed off and concluded by the senior director of investigations and a middle-ranking official at the NIO without the knowledge of the chief executive of the ombudsman's office. You still say that you found no evidence of systemic interference, but surely that in itself is interference.

Mr McCusker:

I think —

Ms J McCann:

Just let me finish. To say it is extremely odd does not go far enough. A group signed off on a five-year review. Incidentally, four of the recommendations from the review were accepted, 20 were rejected and two were deferred for further discussion. That is a bit more than odd.

The CAJ report deals with the salary and the further moneys that were taken from the public purse, which you also alluded to in your report. The ombudsman's office is very much based on public confidence. If there is no public confidence in it, it does not work. We have discussed finances in all the Committees, in the Assembly and everywhere else. Is it normal practice in an office of this type for someone who is on a salary of £140,000 to £145,000 a year to be given an extra £70,000 out of the public purse? There is an issue of confidence here. Is the office in chaos?

Mr McCusker:

I will work my way through those points.

On the first point about the five-year review, the oddity of the issues that you raised came from how the ombudsman's office dealt with them. Here you had a person who was essentially signing off on a position for the office that neither the chief executive nor the ombudsman were aware of. That person was purporting to represent the views of the ombudsman's office to the Northern Ireland Office. That in itself is odd.

Ms J McCann:

Do you not think that it is more than just odd?

Mr McCusker:

That happened in June, the submission was made in October and the ombudsman and the chief executive found out about it around the end of November and beginning of December. However, nothing happened: even when they found out that all of this had transpired, the issue was dropped. That is odd. If I think long and hard I will think of another word for it, but that happening in the office is a strange situation that I have never come across.

I talked to senior officials in the DOJ and the NIO, and they understood that the senior director of investigations was representing the views of the ombudsman. Fundamentally, the main issue was that things were falling apart in the ombudsman's office over that particular issue. I have set that out in the report.

I have no insight into the salary negotiations for the post. That was undertaken by the Northern Ireland Office, and I did not do any investigations into that. Clearly, the chief executive had concerns about the salary package that was being offered, and I referred to the fact that he should have been more involved in that. There was a whole series of discussions and e-mails after that on how that would be played within their accounts. That was in the CAJ report.

I agree with you: the ombudsman's office has to give confidence to the public and to the police. That is the statutory position. A situation where that confidence is questioned is serious. We could get a thesaurus out to decide whether we talk about chaos, dysfunctionality and so on,

but the office has not been a happy place for the last 12 to 18 months.

Ms J McCann:

I want to go back to the five-year review. The recommendations in that review were supposed to strengthen the role of the ombudsman's office. A group signed off on that without the ombudsman's knowledge, or whatever you want to call it. Four of those recommendations were accepted, 20 were rejected and two were deferred for further discussion. You said that you were concerned that an agreement appeared to have been concluded between the senior director of investigations and a middle-ranking official of the NIO without the knowledge of the ombudsman or the chief executive. Surely that points to interference.

Mr McCusker:

No, what I said was that the ombudsman's position at the point in June when the thing happened was essentially that it was better to roll everything into the next review. That is what he thought was actually happening and what his official was dealing with. What appears to have happened was something different; what was concluded and signed off by the senior director of investigations was different.

There are two views. One is the Department essentially saying that it understood that to be the ombudsman's position when he signed off on that document. You have to call it one way or the other, but the main issue was that the lack of communication between the ombudsman, the chief executive and the senior director of investigations meant that that went on without anybody checking what was going on.

Mr B McCrea:

I did not get these papers early enough to have a look at them in detail. I do not know when they arrived.

The Chairperson:

Last night.

Mr B McCrea:

Was it after 5.00 pm? It is a bit of a problem; I did not pick up my pack until this morning. I am not in any way criticising the Committee Chairperson or the staff, but it is difficult sometimes to

have a look at these matters without having full scrutiny of them.

Your first conclusion is:

“I have not discovered any evidence of systemic interference”.

Why did you choose to lead with that statement?

Mr McCusker:

We have already had a long discussion about that. I led with it mainly because the thrust of the chief executive’s argument was that there was systemic interference throughout the Department. That was not my conclusion. I accept what Mr McCartney said: perhaps I should have said something else in the conclusion, but I do not think that anybody who reads the report will arrive at a conclusion other than that I found that there was interference —

Mr McCartney:

The headline writers might have a different view.

Mr McCusker:

I accept that point. That is more of a drafting error on my part, but people will make their own view on that.

Mr B McCrea:

It is germane to the whole thrust of the argument about interference. One could be forgiven for reading your conclusion as stating that you did not discover any evidence of systemic interference, full stop. However, if I understood your argument correctly, it was that there was significant interference but it was only one individual.

Mr McCusker:

I have answered the issue of whether I should have put another conclusion in there. In my conclusions, I go on to say specifically what the issues of concern were. The first paragraph is immediately followed by another that outlines where the two big issues of concern are.

Mr B McCrea:

You talked about thesauruses and semantics and whatever, but this report and your evidence have completely, utterly and totally shredded the credibility of the Office of the Police Ombudsman. It

has completely destroyed 10 years of work. People are unhappy with the ombudsman, the senior investigating officer and the chief executive. I cannot believe that the statement says that the senior investigating officer, who is at grade 3, admitted that he lied. That is staggering.

I cannot find the article, although I am sure it is in here somewhere. However, you can help me with this bit and maybe point me in the right direction: somebody could not go into the office because they feared for their physical safety from the chief executive?

Mr McCusker:

That was the suggestion, the allegation.

Mr B McCrea:

I am not sure where the Department of Justice or whoever should go with this, but the reason why we, in the wider sense, are looking at this is so that you could look at it and see whether there was a problem with interference. I am concerned that leading with the first conclusion is designed to minimise the damage to the body politic, yet there is significant damage in this. You mentioned systemic interference. How did you reach the conclusion that it was not systemic?

Mr McCusker:

That was on the basis that there was no evidence presented to me, or no evidence that I uncovered, that actions were taken by the Department through its senior ranks to interfere in the functionality of the office. In fact, I made the point in the report that, at a point in time, my view was that they probably should have intervened more than they did because of what was happening at senior level in the office.

Mr B McCrea:

However, you could almost argue that lack of interference or action — to do nothing when faced with a situation — is as damning. Bear in mind that the ombudsman's office was looking into a lot of difficult issues that were going on at the time. When was the Department of Justice aware of the crisis in the ombudsman's office?

Mr McCusker:

There were a number of incidents. It would have been aware of the potential issues coming out of the most toxic issue, that in relation to grading, since last summer.

Mr B McCrea:

That is the issue of grading, but there is an argument about what happens if you know there is a systemic problem and you do nothing. When would they have really realised that, in the balance of probabilities, they had a serious problem here?

Mr McCusker:

To be honest, that is a difficult question. In the five-year review, for example, they were unaware of the issue because the ombudsman never picked it up afterwards. He never went back and said, “Why did all this happen without my knowledge?” So, that was never picked up.

I think that I said in the last part of the conclusion that over the past 12 months there were points when, clearly, to have a senior director of investigation going off in the terms in which he did seemed to me to be a point at which you needed to intervene.

Mr Dickson:

Thank you, Mr McCusker, for the work you have done in preparing this report. I suppose, in a sense, we should not be shooting the messenger here today.

Mr McCusker:

Thank you very much.

Mr Dickson:

It is your report, and you wrote it as you saw fit. However, I agree with my colleague Mr McCartney that whatever way you dress the report up, paragraph 39 matches exactly the terms of reference that you had, which says that officials interfered. Paragraph 39 states:

“This was a disturbing event and represents clear interference”.

Whether or not you repeat that in your conclusions, it is there in the report. Everybody around this table, including you, accepts that there was interference, and that that does match up with your terms of reference.

Can I go back to the point about the five-year review and this matter being signed off by people who then did not seem to let other people know that they had signed it off? Surely that in itself, in both areas, has to be the subject of investigation and potential disciplinary action against

those individuals. Secondly, and I suppose this comes to the fundamental bit of the whole report, you yourself said that the ombudsman is in a unique position. He is his own board and chairman in relation to the rest of business. Does that not put greater additional responsibility on him to go to the DOJ, the NIO, the Audit Office or wherever he might feel is appropriate to get advice, guidance and assistance if he saw underneath him — it is very difficult to contemplate how he could not see it — that total and utter dysfunctionality? It calls into question what on earth he was doing as ombudsman if he could not see that or, even worse, he could see it but concealed the need to urgently address it. Because of the outcome of all this, he has totally and utterly undermined public confidence in the role and office of the ombudsman. If he cannot see that for himself, he has to question his position.

Mr McCusker:

I note what you say. Most of the matters that you raised are matters either for the ombudsman or the Minister and the Department. The issue was raised by the chief executive in the sense that there was no control over that particular action, and, once he had made the allegations, the Department was duty bound to investigate them. There was always going to be an outcome. The question was whether to detail it the in way in which I have detailed it. I could not figure out a way to write the report that would not cover the detail of what happened.

In particular, I talked at length with the three main people about that. A number of issues transpired, between my giving the first report, on 16 May, and when I finalised it, over their concerns about what might or might not be in the report. My view was that the report would not make sense if significant parts were to be redacted on a personal basis. If I had come out with a report consisting simply of conclusions, you would not have understood it. That was my call, but it was based on their agreement that they were prepared to live with the detail. I recognise that it is not particularly nice to play out personnel issues in public, and some of the conversations that I had to go through with individuals were difficult, both for them and for me, but, as you said, it was my call as to how the report was presented. We have dealt with the particular point that Mr McCartney raised. As you said, paragraph 39 makes a strong point about the particular issue that you raised. So, I will live with the report.

The Chairperson:

Finally, to tidy up a couple of points, was the interference of the DOJ official the extent of the interference? Did it go beyond solely dealing with the job evaluation issue?

Mr McCusker:

There is no evidence of that, although the same official was involved in the five-year review, which is something that the Department might want to look at. Certainly, the relationship between the chief executive and that individual was not a happy one.

The Chairperson:

Thank you, Mr McCusker.