Introduction

1. I have been asked to submit evidence to the House of Commons Northern Ireland Affairs Committee, which is conducting an inquiry into devolution and democracy in Northern Ireland following the collapsing of the Northern Ireland Executive (‘the Executive’) and the failure of the political parties in Northern Ireland (so far, at least) to agree to restore the Executive following the elections to the Northern Ireland Assembly (‘the Assembly’).

2. I understand that the Committee is particularly interested in the ‘models’ which have previously been used when Northern Ireland has experienced periods of suspension of the Assembly or long periods with no Executive, and whether any of these ‘models’ would be useful now, or whether a fresh approach is required. In addition, I understand that the Committee would welcome evidence on the potential options for returning ‘accountability and democracy’ in Northern Ireland, should the Executive not be restored.

3. My evidence to the Committee is divided into four parts. First, I identify some of the problems that arise from the absence of an Executive and a functioning Assembly. Second, I suggest some of the political problems that instituting direct rule as an alternative would be perceived to bring. Third, I consider some of the ‘models’ that evolved previously, ad hoc and reactively, to attempt to cope with the problems of direct rule, and I offer some tentative comments on perceived advantages and disadvantages of each of the models. Fourth, I consider some criteria for evaluating these ‘models,’ in terms of their future use, should the Executive not be restored in the near future.

Some problems with the status quo

4. In brief, with the exception of introducing emergency legislation to authorise a budget, the Secretary of State for Northern Ireland has not indicated that she would be prepared to step in and take over the powers that devolved Ministers in the Executive would exercise.

5. This places the Northern Ireland Civil Service in the position of exercising its responsibilities largely in the absence of decision-making by elected politicians. This has the effect that where devolved Ministers in the past had agreed a policy position in sufficient detail, civil servants have continued to operate under that policy. But where a policy position had not been agreed (either because the issue was still under consideration, prior to the most recent Assembly election, or a new issue has arisen), civil servants consider themselves disabled from proceeding further.

6. The Committee has already received evidence from David Sterling, Head of the Northern Ireland Civil Service, and Hugh Widdis, Permanent Secretary of the Department of Finance, Northern Ireland Executive. This evidence provides strong support for suggesting that two main problems can be identified with the current arrangements.

1 By ‘models’ I mean only simplified schema of possible futures; ‘model’ is not used here to indicate approval.
2 Evidence, 24th January 2018.
7. First, without Ministers, the civil service has no person with a democratic mandate able to set new policies. There is, for example, no budget in place for next year, beginning 1 April 2018. As regards Brexit, the civil service is largely restricted to engaging with other Whitehall departments by providing factual information, and responding to questions about possible future scenarios and impacts, rather than providing a view on what policies might be in the best interests of Northern Ireland. This policy-making vacuum will be particularly problematic in the context of discussions concerning the possible re-calibration of devolution powers, arising from the UK’s departure from the EU, which is likely to add to the current difficulty of restoring devolution.

8. Second, without a functioning Assembly, there is no one to enact primary legislation regarding the devolved functions. Where government action can be authorised by new secondary legislation, a critical difference arises between legislation that is subject to negative resolution by the Assembly, as opposed to legislation that is subject to affirmative resolution. In the former case, given that the Assembly is in existence but non-functioning, the secondary legislation is laid before the Assembly and, since no negative resolution is passed, the legislation is duly enacted. But that procedure cannot work, of course, where an affirmative resolution is required. This will have particular consequences for the extensive secondary legislation arising from the EU (Withdrawal) Bill. Much of that legislation, I understand, will require regulations to be approved by affirmative resolution by the Assembly.

9. There have, as the Committee knows, been several periods when devolution was interspersed with direct rule. The current situation is, however, unique, in the sense that this is the longest period during which there have been no Ministers of any kind (either devolved or direct-rule) exercising their functions. As a result, until institutions are restored, there is not only a ministerial-deficit, but also an accountability-deficit, and a good-government deficit, all of which must be addressed.

10. The current arrangements, in operation since before the last Assembly elections, where the civil service behaves as a proxy government, effectively operating under the political guidance of previous Northern Ireland Executive Ministers to the extent that it is possible to divine this, puts the civil service in a difficult and potentially exposed legal and political position. This is unacceptable. It is clear that this cannot continue indefinitely, and that some arrangements must be put in place, in the absence of a return to devolved government, at least to regularise the position of civil servants exercising the powers they currently do.

Some problems with direct rule

11. One possibility, of course, is the re-imposition of direct rule, with the Secretary of State (and junior Northern Ireland Office Ministers) exercising the powers previously entrusted to devolved Ministers. The effect would be to address, at least to a degree, the current ministerial-deficit, accountability-deficit, and the good-governance deficit, by enabling decisions on new policies to be implemented.

12. However, direct rule is not without significant problems. There are at least four, overlapping, problems, as I understand them. The first is that it violates the principle of consent enshrined in the Belfast Agreement, unless local parties and the Government of Ireland agree to direct rule being introduced. The second is that few direct-rule ministers come from Northern Ireland or have any previous connections with Northern Ireland; there is, as a result, the ever-present likelihood of policy misjudgements deriving from lack of understanding of the complex political, economic and social situation. The third is that direct rule operates under procedures in which ordinary Parliamentary scrutiny is attenuated, leading to accusations that Northern Ireland is being governed in a quasi-colonial fashion. The fourth is that the Irish Government (and Northern Ireland nationalist and republican politicians) are deeply resistant
to a return to direct rule, viewing it as implicitly supporting a unionist policy preference, thereby upsetting the careful balance between the competing political aspirations that the Agreements sought to create. Given that the United Kingdom Government is dependent on DUP support in the House of Commons (under the ‘confidence and supply’ agreement) that perception would, no doubt, be strengthened.

*Previous models of government used during previous periods of direct rule*

13. In this section I identify some approaches that might considered to reduce the negative impact of rule by direct-rule ministers, based on previous experience, attempting to identify both the advantages and disadvantages of these models. They are considered in no particular order. It should be noted that none of these models operated by itself, and that in some respects they overlapped. Nevertheless, it is worth distinguishing them, for the purposes of analysis.

14. **Enhanced civil service role** Perhaps the most stable element in governing Northern Ireland, in periods when the Assembly and Executive were not in operation, was the civil service, comprising the Northern Ireland Civil Service and the Northern Ireland Office. The civil service kept the show on the road in as professional a way as was possible, given the constraints under which they were operating. Direct-rule ministers were overwhelmingly dependent on civil service advice. Beyond regularizing the position of the civil service, should the civil service be given an even more significantly enhanced role in the current circumstances? I think not, not least because I doubt if the civil service itself would welcome being pushed into taking direct responsibility for controversial political decisions. There has been a consistent attempt, at least since 1972, to prevent the politicization of the civil service. Thrusting them further into the political limelight would be likely to lead to the opposite result.

15. **‘Great and Good’ advisory committees** In the early days of direct rule under Secretary of State William Whitelaw, during the first half of the 1970s, an advisory committee was established which was consulted on major issues that arose during that period. The committee consisted of individuals appointed directly by the Secretary of State, and attempted to draw in prominent individuals in the community who were considered broadly representative of unionist and nationalist opinion, although in most cases the individuals were not formally members of any political parties. This committee did useful work, on occasion, but it is difficult to conceive such a committee being regarded as appropriate or acceptable now, given that it would be seen as a slap in the face for elected party politicians. It would immediately face challenges to its legitimacy, leading to a dearth of prominent individuals being willing to serve.

16. **Quangos** One of the principal ways in which government was conducted, in the absence of devolved government and local Ministers, was significantly to increase the role of statutory agencies, so-called ‘quangos’. Quangos were given considerable responsibilities in the areas of social housing, personal social services, education, and libraries, to name but a few. This model of administration has the advantage of hiving off certain functions of government, establishing an independent body with its own staff, overseen by appointed members, thus engaging a cadre of citizens in the running of aspects of Northern Ireland society and economy. Significantly expanding the role of such bodies, however, might have the significant disadvantage that the bulk of the independent members charged with overseeing

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the operation of these bodies were entirely non-representative in political terms, and filling vacancies was sometimes seen as providing the opportunity for the exercise of patronage by direct-rule Ministers, rather than expert government.

17. Westminster accountability Increasing accountability mechanisms regarding Northern Ireland at Westminster might appear to some to be an attractive approach. The House of Commons Northern Ireland Affairs Committee, established in 1994, originates in just such an initiative, when there was no devolved government and it was thought desirable to introduce a greater degree of scrutiny of the operation of direct rule. The Committee has in the past played a constructive role in scrutinising aspects of direct rule. (I should disclose that I acted as an advisor to the Committee in the past.) The operation of the Committee has not, however, in general, succeeded in establishing itself as sufficiently non-partisan, or as a sufficiently effective mechanism of accountability, for its role to be expanded. Since the last election, with the absence of any SDLP representation or Sinn Féin participation in the Commons and, by virtue of this, currently on the Committee, its representativeness has been questioned. Moving further in this direction would be seen by some as a step towards further integration of Northern Ireland into the UK, which would be seen as a partisan move.

18. Expanding functions of local government It might be thought preferable to take advantage of the relative success of local government in Northern Ireland, and formally to transfer more functions from the Assembly and the Executive to local councils. However, to do so would run the risk of having two adverse effects. First, the transfer of ever more politicized areas of policy to local government runs the risk that local government would become much more contentious. Second, transferring functions from Stormont could render restoring the Executive and the Assembly even less attractive to ambitious politicians. Is there some alternative, such as building some institutional forum in which local government political representatives might be brought together to perform a scrutiny function over proposed measures and policies adopted by direct-rule ministers, without transferring devolved functions to local government? Theoretically, yes, but there is no reason to suppose that local government representatives who are members of parties that do not participate in the Northern Ireland Executive would be any more willing to serve in such a forum, if this was seen as attempting to establish some proxy for the Executive or Assembly. There is also some evidence that “Northern Ireland local government … appears suspicious of engagement with devolved government.”

19. Enhanced community and voluntary sector participation A striking feature of Northern Ireland political life has been the role of a vibrant and well-connected community and voluntary sector in political life. In particular during periods of direct rule, this sector partially filled the vacuum caused by the absence of elected politicians. In the past, sustained attempts were made to engage that sector in government through enhanced consultative and participative arrangements. One prominent example are the mechanisms established in section 75 of the Northern Ireland Act 1998, the public-sector equality duty. There is, perhaps, the potential for an enhanced system of consultation by imposing a duty on direct-rule Ministers to consult on key issues of the day, beyond what might be required by legislation. The operation of the equality duty mechanisms, however, demonstrate a degree of

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consultation-fatigue over time, and the reduction in financial support for the sector is likely to have reduced its capacity.

20. **Civic Forum** Some have suggested the re-establishment of the Civic Forum, or some near equivalent, which would bring together representatives of the community and voluntary sector to be consulted on measures and policies proposed by direct-rule ministers. The Civic Forum was a consultative body in Northern Ireland created under the Belfast Agreement, and operating between 2000 and 2002, when it was suspended at the same time as the Assembly. The 2014 Stormont House Agreement envisaged, instead, the creation of a non-statutory Civic Advisory Panel. There is little evidence that when the Civic Forum operated in the past that it proved particularly useful, not least because there was significant criticism concerning the representativeness of the body, and attempting to reconstruct a more elaborate mechanism for consultation of this type is unlikely to prove any more successful. The more recent suggestion of a citizens’ assembly is clearly worth considering, but so far its potential mandate seems relatively undeveloped.

21. **Rolling devolution** A further model of direct rule operated during 1982-86, when so-called ‘partial’ or ‘rolling’ devolution was in place. An Assembly was elected by proportional representation in 1982. The Assembly's role was originally confined to scrutinizing Northern Ireland Government Departments, and each of the six Northern Ireland departments was shadowed by an Assembly committee. The Assembly’s role was ‘consultative and deliberative’ and included the scrutiny of draft legislation and making reports and recommendations to the Secretary of State. However, it was envisaged that more powers could be gradually devolved to the Assembly if 70 per cent of Assembly members agreed. Although the Assembly operated in ‘consultative and deliberative’ mode, it had limited legitimacy from the start, as no nationalist parties participated and the failure to win cross-community support has been seen as having undermined it from the start. It was abolished in 1986, but it was reported in 2006 that Secretary of State Peter Hain contemplated a similar model, as a way of addressing the negotiating stalemate at that time. Whether local political parties would be willing to participate in such an Assembly today is, at best, uncertain.

22. **Judicial review** The role of judicial review should not be underestimated when considering what might fill any vacuum created by the absence of devolved government in Northern Ireland. Judicial review is affected by political developments in Northern Ireland, and in the past has been used tactically to advance political and accountability goals, in the absence of other mechanisms. In a context where, for example, desired social change could not be achieved through devolved legislation, and Westminster proved unresponsive, it would be likely that interested groups and individuals would seek to use the courts to attempt to bring about desired change. So too, in the absence of other mechanisms of accountability of direct rule ministers and the civil service, judicial review may well prove popular as an alternative. The disadvantages, apart from the obvious problems of encouraging a greater political role for the courts, lie in the cost and in the relative unpredictability of such actions. It would be hard to imagine that the courts in Northern Ireland would, or could, be used as a substitute for the absence of politically representative bodies on a long-term basis.

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23. **Irish Government involvement** In the period before the Belfast Agreement, the mechanisms established by the Anglo-Irish Agreement of 1985 operated. The 1985 Agreement established the Anglo-Irish Intergovernmental Conference (AIIC), made up of officials from the British and Irish governments. This body was concerned with political, legal and security matters in Northern Ireland, as well as ‘the promotion of cross-border co-operation’. It had a consultative role only; it had no powers to make decisions or change the laws. The Conference only had power to make proposals ‘insofar as those matters are not the responsibility of a devolved administration in Northern Ireland’. It proved to be extremely unpopular with unionists. These arrangements were replaced by the provisions of the Belfast Agreement.

24. Some have advocated that during any further period of direct rule an enhanced role should be accorded to the British-Irish Intergovernmental Conference (BIIC), established under the Belfast Agreement. However, the Agreement appears to envisage the operation of the BIIC whilst the other institutions are in operation, rather than operating as a replacement for these institutions when suspended. In particular, it specifically states that the BIIC is to consider matters that are not devolved, as did the AIIC, and specifically preserves the sovereignty of the United Kingdom Government. Given these constraints, it is unclear what non-devolved issues could usefully be discussed, other than the operation of the Belfast Agreement itself. Indeed, it was this issue that the BIIC was usefully involved in considering, leading up to the St Andrew’s Agreement, but that is a far cry from guaranteeing an enhanced role in the day-to-day operation of direct rule.

25. It would be conceivable to imagine Irish Government and direct-rule Ministers running the North-South Ministerial Council in such a way that the Irish Government would have considerably more influence in day-to-day direct rule, but that would be likely to be seen as contrary to unionist interests, tipping the balance towards nationalism, and in any event the Irish Government has shown no signs of wanting to be so deeply involved in the day to day operation of government in Northern Ireland.

**Criteria for evaluation**

26. Several of the ‘models’ discussed above would, to a greater or lesser extent, be an improvement on otherwise unconstrained direct rule, in terms of increasing the accountability of direct-rule Ministers. But the Committee is also particularly interested in improving ‘democracy’ in Northern Ireland. ‘Democracy’ may mean several different things, of course, and so it is important to stipulate what type of democracy we are referring to. I suggest that when we refer to ‘democracy’ in Northern Ireland, it is the particular form of democracy instantiated in the Belfast and St Andrews Agreements that is in issue, a power-sharing democracy, and no other form of democracy, such as a Westminster-style majoritarian democracy is likely to be either acceptable or workable in the longer term in Northern Ireland. If the Executive is not restored in the form contemplated under the Agreements, together with a working Assembly, no other arrangements will be an adequate substitute for these in terms of restoring this form of democracy. All other arrangements, to the extent that they fail to secure power-sharing government based on consent and equality, fall short of the democracy appropriate for Northern Ireland, in my opinion.

27. Put bluntly, there is no acceptable alternative to the broad approach adopted in the Belfast Agreement, as modified by the St Andrew’s Agreement. This is not to say that further

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changes in the Agreements could not, or should not, be introduced. The Belfast Agreement’s review mechanism itself contemplates such changes, but so long as these changes are agreed by the parties to the Agreement and thereby secure cross-community consent.

28. I suggest that arrangements for the government of Northern Ireland that are likely to win the consent of both communities in the future are highly unlikely to depart from the principles set out in these Agreements (in particular the principles of consent, power-sharing, and equality). As a result the institutional features of any agreed government structure in Northern Ireland will look very similar to those incorporated already in the Northern Ireland Act 1998. To think otherwise is to ignore the lessons of history. To the extent that the Committee is seriously considering an alternative to those Agreements, in terms of replacing the existing commitment to power-sharing democracy, or consent, or equality, that is both dangerous and unlikely to succeed, in my opinion. Attention should be focused, instead, on securing a return to the institutions of these Agreements, and their stable operation in the future.\textsuperscript{13}

\textit{31 January 2018}