

EMPLOYMENT POLICY : INTERIM REPORT

(A Paper by James Prior)

INTRODUCTION

This paper outlines our general strategy on employment matters and puts forward specific proposals on the closed shop, employee participation, voting in union elections, payment of supplementary benefit to strikers families and picketing. It incorporates the views so far developed by our policy groups, but it is neither final nor comprehensive. The reasoning behind the various proposals is set out in the appendices, or, in the case of employee participation available on request

STRATEGY

In developing policy in the employment field, we must bear closely in mind that we are seen to have interfered too much by legislative means in industrial relations in the past (however justified that legislation may have been, and unresolved though many of the problems remain); and that large scale changes in the law affecting collective bargaining have been introduced for the second time in five years suggesting that further major legislation would be unwelcome.

We recognise that a major task must be to convince the public (and as far as possible the unions themselves) that we are not antipathetic towards trade unions and do not seek a major confrontation. But this objective must be balanced against the need to ensure that people know we share their concern about the growth of union power and influence and have no intention of allowing it too much scope. We must appear neither unduly provocative nor unduly timid.

/ ..... POLICY

*go out  
1/18/00*

POLICY ISSUES

A. The closed shop (see Appendix 1)

A closed shop arises where an employer and his employees (or their representatives) decide that particular jobs should only be obtained or retained by people who are or are willing to become members of trade unions.

It can jeopardise individual rights

- (1) where people object on grounds of conscience to joining a union,
- (2) where people, though willing to be members of a union, are refused admission or expelled unreasonably,
- (3) where malpractices occur in unions operating a closed shop with the result that individuals are adversely affected.

The problems are particularly acute where alternative sources of employment are scarce or non-existent (e.g. most nationalised industries).

Under the Trade Union and Labour Relations Act 1974 and 1976, unions and employers are permitted to negotiate closed shop agreements involving each of these threats to individual freedom.

Proposals

- Depend  
on  
union?*
- Part of deal*
- (1) Employers should be made aware that no closed shop can be negotiated without their agreement.
  - (2) Employees should be reassured that the new law does not mean that they must either join a union or lose their jobs.
  - (3) Employers organisations should be encouraged to issue advice to members stressing these two points and making it plain that, where members wish to concede a closed shop, the wording of agreements should protect individual freedom.
  - (4) The Council of the Advisory Conciliation and Arbitration Service should be encouraged to issue:

- Such a  
claim*
- a Code of Practice on union membership agreements, indicating that such agreements should include a conscience clause; should be post-entry and not require existing employees to join, and should provide an independent appeals procedure for those expelled or excluded from unions and for those who wish to claim exemption on grounds of conscience,
  - a Code of Practice on union rules and procedures comprising the best practice in this field.

This is in line with the statements made by the Leader of the Opposition and the Shadow Employment Secretary on 28th February when they promised no major legislative upheaval in industrial relations. Any attempt to outlaw the closed shop would be disruptive and impractical, whilst reliance on the unions to regulate the operation of agreements would be overoptimistic and ineffective.

Legislation

It may be possible to avoid any legislative change to effect this policy if the Council of the ACAS can be persuaded to use their statutory power to draw up Codes at their own instigation. Alternatively, a brief alteration to the Employment Protection Act could extend the duty, already placed upon ACAS to prepare Codes on specific subjects, to include the two proposed.

- W3?
- That the Directors of Companies beyond a certain size describe in the Annual Report of the Company how the employee interest is taken into account.
  - That the Annual Report be circulated to all employees.
  - That the ACAS or a comparable body draw up Codes of Good Participation Practice applicable both in the public and private sector.

We further propose that the ACAS should give guidance inter alia in the following areas:

- (a) Disclosure of information including the presentation of information, and the content of information agreements.
- (b) The drawing up of that part of the Annual Report which refers to recognition of the employee interests and the presentation of the Annual Report to all employees.
- (c) Unstructured participation with particular regard to techniques such as briefing groups, working parties, etc.
- (d) Education and training.
- (e) } The extension of collective bargaining where this is jointly agreed in preference to a participative approach.
- (f) } The various formal participative structures available with advice on their suitability to particular circumstances and areas of decision including the implications for multi-units and foreign subsidiaries.
- (g) Participation Agreements.
- (h) Use of established organisations (e.g. Trade Unions).

And that it should be bound to insist on the right of every individual employee to vote in any election to choose a representative or representatives to speak for him.

- That companies employing more than 2,000 people in the United Kingdom conclude participation agreements with their employees which take account of the relevant Codes of Practice. In the majority of cases this will demand the creation of a Company Council, if this does not already exist, which will meet the minimum requirements of the EEC Green Paper.
- That 12 months after publication of the relevant Code of Practice the Annual Report referred to above, describes the extent to which the Code of Practice has been taken into account.

2. } Not later than 3 years after the promulgation of the Codes of Practice, the ACAS should be encouraged and if necessary required to recommend to Parliament any further changes in the law which it may regard as being necessary to improve good industrial relations through the development of employee participation.

3. Encouragement should be given to schemes which would encourage wider share ownership among those working in industry and tax incentives should be given to the acquisition and retention of shares by all employees on a medium to long term basis. We believe that American experience shows the benefits of this both to individual Companies and to the wealth creating process.

Only 3 per cent of Britons over 21 own shares in their own right. It must be in the interests of the Conservative Party to increase this number both because it will lead to a greater understanding of industry and greater identity with the success of the enterprise.

We are aware of the outline proposals of the Policy group on wider share ownership and support them wholeheartedly.

#### Legislation

Our proposals on participation would mean amending company law to create the proposed new duties on directors, and altering the Employment Protection Act to require the ACAS both to produce the proposed new codes and to put forward proposals for any further changes in the law. The suggestions on financial participation could be achieved via Finance Bills.

#### Cost

The cost to Government of the proposals would be limited. They would involve some expansion of ACAS and of training facilities. They also imply tax incentives for certain forms of financial participation designed to improve motivation and efficiency. The potential benefits through better industrial relations are unquantifiable but could be considerable.

#### Presentation

The emphasis in our proposals on a gradual, flexible approach based on consent, and on concentrating initially on participation at task level will not have the short-term political potential of a more radical policy. We believe, however, that this approach will not present the grave risks inherent in alienating significant sections of industry and that it best protects the position of the individual employee.

We do not believe that it would be sensible to make a major statement in any event before the publication of the Report of the Bullock Committee of Inquiry into Industrial Democracy which is expected at the end of the year.

#### C. Elements affecting the balance of power in industrial relations (see Appendix 3)

##### Proposals

##### 1. Voting in union elections:

- That legislation be introduced to provide free postal ballots for trade union elections on an optional basis.

/ - That

- That payment should be made to the Post Office which would distribute voting papers and reply paid envelopes.
  - That the Certification Officer be empowered to approve the grant of a free post to safeguard against potential abuse.
  - That an incoming Conservative Government should not commit itself to details of any scheme and should discuss the matter with the TUC.
  - That unions should be entitled to hold ballots at a place of work during working time provided that they have a specified number of workers at a particular place of work.
2. Payment of supplementary benefit to strikers' families:
- That supplementary benefit be treated as earned income and taxed accordingly.
3. Picketing:
- That the possibility be examined of a 'deal' whereby in return for severe limitations on the number of pickets a limited right to stop traffic would be granted.

#### Legislation

The proposals on union elections and on picketing (if a deal was achieved) would involve short bills. The proposal on supplementary benefit could be carried out in the Budget.

#### Cost

The free post facility would involve a potential cost element, although limited take-up will probably hold it down. The potential savings via the encouragement of moderate activity should be noted. Taxation of supplementary benefit would offer a small yield to the Exchequer.

#### Presentation

These are three of potentially the most difficult areas. On each, there is undoubted public concern, but great union sensitivity. It is of considerable importance that the full arguments, as set out in Appendix 3, are understood and that the proposals are not merely 'written off' as union-baiting. It is suggested that statements outlining the problems should be made well in advance of an announcement of policy proposals. The nature of the proposal on picketing suggests that it would best be left until we return to office.

The Closed ShopI Definition

1. The normal definition of the closed shop describes it as "a situation in which employees come to realise that a particular job is only to be obtained and retained if they become and remain members of a union".  
(Source W.E.J. McCarthy 'The Closed Shop in Britain' Blackwell 1964, adopted by the Royal Commission on Trade Unions and Employers Associations 1965-68 Cmd. 3623)
2. The Trade Union and Labour Relations Acts 1974, and 1976 describes the closed shop agreement ('union membership agreement') as "an agreement or arrangement which -
  - (a) is made by or on behalf of, or otherwise exists between, one or more independent trade unions and one or more employees or employers' associations; and
  - (b) relates to employees of an identifiable class, and
  - (c) has the effect in practice of requiring the employees for the time being of the class to which it relates (whether or not there is a condition to that effect in their contract of employment) to be or become a member of the union or one of the unions which is or are parties to the agreement or arrangement or of another specified union".
 (§30(1) Trade Union and Labour Relations Act 1974, as amended by S3 (3) Trade Union and Labour Relations (Amendment) Act 197 ).
3. These definitions include situations in which employees must already be amongst existing union members before they can be considered for a job - i.e. effectively union appointment (e.g. dockers); or where recruitment is solely from apprentices and the numbers of those apprentices is limited by union/management agreement. They include circumstances in which employees are required to join a union within a short time of being taken on (the post-entry closed shop) and - less common - cases where a person must join the union before they can be appointed (the pre-entry closed shop).
4. They cover arrangements which apply to one operation in a small part of a plant; to all blue or white collar workers in a plant or company; or to every job in an entire industry. They extend to circumstances where those agreeing to the introduction of the closed shop comprise the entire group affected, as well as where only a simple majority, or even fewer, have indicated assent. The agreements may offer the choice of belonging to only one union, or many.
5. The breadth of those definitions is such that they cover not only situations where there is a formal written agreement between the management and the unions, but also those where there is no more than a tacit understanding, or an overt or covert threat to strike. The definition in the Acts is particularly wideranging. It will be seen that it refers not only to agreements which are made between trade unions and employers, but also to 'arrangements' which 'otherwise exist' between them. There is no legal definition of 'arrangement' in this context and it could cover circumstances where there has been no express statement by the employer or the unions, and conceivably even extend to situations where there had been no such intent.
6. It is felt that those definitions are too loose and wideranging. Both employers and unions should be fully aware that a decision to adopt a closed shop in a particular area of employment should consciously be taken. The following definition should be adopted:  
"A closed shop arises where an employer and his employees (or their representatives) decide that particular jobs should only be obtained or retained by people who are or are willing to become members

of particular trade unions".

## II The problems

7. Two types of criticism are made of closed shop agreements.

### (i) individual freedom

8. It is argued that the freedom of the individual may be infringed by closed shop agreements

- (1) where people object on grounds of conscience to belonging to a union
- (2) where people though willing to be members of a union, are refused admission to the union or expelled unreasonably from it
- (3) where malpractices occur within unions operating a closed shop with the result that individuals are adversely affected.

### (ii) labour shortage

9. It is also suggested that the closed shop creates labour shortages

- (1) where agreements restrict the right to work to members of certain unions
- (2) where the agreement restricts the numbers to be trained in particular skills
- (3) where the agreement restricts entry to people who have done recognised apprenticeships.

## III The closed shop in practice

10. The use of the closed shop has grown and receded several times over the last 100 years or so, but the only statistical indication of its extent is given in the result of a survey carried out by McCarthy. He found that  $3\frac{1}{2}$  million employees worked in closed shops in Britain.

This represented:

- 39% of all trade unionists
- 16% of all employees
- 26% of the labour force in manufacturing and extraction.

A further 1,350,000 workers were employed in 'closed shop prone' trades; i.e. they were in jobs where it was exceptional not to be in a closed shop. If those were added, the total represented:

- 22% of all employees
- 31% of the manual labour force.

(Source: W.E.J. McCarthy op.cit.)

11. Whilst the Industrial Relations Act was in force, only a variant of the closed shop was generally permitted, namely the Agency Shop. This included provision for employees with objections to union membership to 'opt out' provided that they made a payment equivalent to union dues to the union or to a charity. It is unknown how far this affected the extent of the closed shop, but it may be inferred from the continued growth of union membership during 1971-74 (when the Industrial Relations Act was in force) that it was not significantly diminished.

12. Similarly, it is unknown to what extent in practice the closed shop interferes with individual freedom. McCarthy found that only 750,000 workers were in closed shops of the most restrictive pre-entry varieties, suggesting that most people seeking work where a closed shop exists or is introduced can obtain a job before being requested or required to join a union. Donovan's findings seem to suggest that those who have conscientious objections to union membership

are often recognised as exceptions.

"Our impression from the evidence we have heard is that trade unions in the main respect genuine conscientious objections, and are usually content if the objectors agree to pay to some charitable body the equivalent of the union dues".

The Commission did, however, also state that the closed shop was "liable from time to time to cause substantial injustice to individuals from which they have no effective means of redress".

13. Finally, there is no authoritative evidence on the extent to which the closed shop plays a part in maintaining restrictions on entry to skilled employment and thereby produces adverse economic effects. The Donovan Commission accepted that it sometimes did so but felt that the effect of the closed shop was only part of the much wider question of the operation of our craft system and the way in which the nation's manpower needs should be met. It was felt that the main need here was to improve the system of industrial training, and that this should be the task of the Industrial Training Boards (now under the Manpower Services Commission). In the last 10 years or so, the numbers receiving skilled training has increased by leaps and bounds, and entry to training has been made much easier suggesting that the closed shop is no longer hampering the process.

#### IV Current Developments

14. It can be seen that the limited available evidence suggests that a sizeable part of the work force are employed in closed shops and that most of those are in 'post-entry' shops. It would seem that in the 1960's the unions tended to recognise conscientious objections and in the early 1970's the imposition of the agency shop required them to.

15. The Trade Union and Labour Relations Acts 1974 and 1976 make legal the negotiation of union membership agreements. Where a union membership agreement is in operation, dismissal of an employee by an employer will be regarded as fair if it is the practice for all employees of a particular class to belong to a specified independent trade union, or to one of a number of unions, and the employee had refused or proposed to refuse to become or remain a member of one of the unions. Those employees, however, who genuinely object on grounds of religious belief to being a member of any union may claim compensation - including reinstatement for unfair dismissal.

16. Because the law is new and there have been few cases under it, there can be no certainty about which of the many forms of closed shop are given this legal protection.

17. Although adoption of the closed shop is not compulsory under the new legislation, union membership agreements are likely to spread for five main reasons,

- (1) employers who are not au fait with the law may have gained the impression that they must negotiate such arrangements and many (though not all) unions will be seen to do so
- (2) old agreements which lapsed during the currency of the Industrial Relations Act are being revived (e.g. British Rail)
- (3) the new law creates certain rights which are obtainable only for trade union members, encouraging many more to seek membership,
- (4) the new law creates the right to belong to a union and the right for unions to seek recognition for bargaining purposes,
- (5) in order to stop the rights cited in (3) and (4) above leading to recruitment of workers by a plethora of unions which would in turn produce chaotic bargaining prone to 'leap frog' claims, several employers will want to conclude union closed shops.

18. There must be some doubt, however, about whether unions will continue to adopt the tolerant view of conscientious objectors which Donovan found. The new law, virtually 'exonerates' unions applying restrictive closed shops where previously it had been silent, and this may not encourage the same responsible behaviour. More important, the recent Industrial Tribunal finding in the case of the workers at Ferrybridge creates problems for unions who do not enforce closed shops totally. There the six men who refused to join one of the unions specified in a union membership agreement were held to have been unfairly dismissed because the specified unions had allowed others the same privilege and the tribunal construed this as meaning that the agreement had not been enforced. The result is that unions can no longer turn a blind eye to individuals who do not strictly obey a closed shop agreement.

19. This means that where the closed shop spreads, individuals who dislike union membership on genuine grounds of conscience will either have to swallow their objections or face dismissal unless the closed shop takes the form of an explicit agreement including a conscience clause. But even where such a conscience clause is included, these important problems will remain.

- (1) where employees express a willingness to join or remain members of an appropriate union where a closed shop exists, but are excluded or expelled, there must be reasonable safeguards that the union action is not arbitrary or vindictive,
- (2) there must be assurance that the grounds of conscience will be fairly assessed in an unbiased manner.
- (3) there must be protection for people against arbitrary union action short of exclusion or expulsion where a closed shop exists.

What the Conservatives have said

20. At the annual conference of Conservative Trade Unionists in Manchester on 28th February 1976, both Mrs Thatcher and Mr Prior covered the closed shop in the course of speeches dealing with the wider question of the general approach of the Conservatives towards industrial relations. These and subsequent addresses have been criticised in sectors of the press partly on the grounds that the Conservatives appeared to be conceding important principles in relation to the closed shop. The following are extracts from the actual speeches. Mrs Thatcher:

"Most closed shop agreements accept the right of the man with a religious objection to opt out. But in our view this exception is too narrow. . . we are sure that there must be proper provision for an effective conscience clause. . . Further where a person has been expelled from his union, it is only fair that he should have a right of appeal to an independent body, and if necessary to the High Court".

Mr Prior:

"We say that people who do not want to join unions because of deeply held personal convictions based upon long-standing conscience should not have to do so. . . .

"An important freedom. . . is at risk. Sadly all the evidence suggests that Michael Foot is unlikely to enshrine this freedom in the law. This will place a tremendous responsibility on union negotiators. . . to ensure that where closed shops are negotiated, union membership agreements include conscience clauses and proper independent appeal procedures. If this does not happen, then it will be the duty of the Government to ensure that effective provision is made".

VI Possible courses of action

21. There are at least four possible courses of action open to an incoming Conservative Government to deal with the basic objections to the closed shop outlined in section 2 of this paper. Two of them have been widely canvassed whilst the others are less well known.

(i) do nothing

22. One option which is not open in light of Mr Prior's and Mrs Thatcher's remarks is that of doing nothing. It is unlikely that this course of action would be open in any event. There is increasing public awareness of the plight of dissenting individuals where closed shops are introduced, and this is likely to grow as union membership agreements spread. The probable result will be a bad press for the trade union movement, particularly as the Ferrybridge decision is going

to mean that they cannot exercise leniency towards conscientious objectors unless they make specific provision for them within each agreement. They are being cast in the unpopular role of press-gangs and it may well be that they themselves will wish assistance in extricating themselves from that position.

(ii) outlaw the closed shop

23. This option was fully examined and dismissed by Donovan for 3 reasons. Firstly, it would be extremely disruptive, given the probable extent of the use of closed shop agreements: agreements covering possibly 5 million people would be overthrown overnight. Secondly the breadth of arrangements which fall within the definition of 'the closed shop' - and even the 'union membership agreement' - is such as to include common circumstances which many people would think eminently reasonable. Thirdly, it would be very difficult to enforce - how for example, can tacit arrangements of the type described in section 1 be effectively outlawed? Finally, there are also some in both management and unions who would argue that this would be outlawing a potentially useful tool. It was for such reasons that Mrs Thatcher and Mr Prior excluded this option.

(iii) repeal the present Government's industrial relations legislation

24. This would effectively mean repealing the Trade Union and Labour Relations Acts and the Employment Protection Act (the Dock Work Regulation Bill currently before the House is a separate matter of more limited application). Some very undesirable provisions would be removed. But it would also mean repealing those parts of the Trade Union and Labour Relations Acts which re-enact the provisions of the Conservative Industrial Relations Act referring to the widely praised Code of Industrial Relations Practice; to unfair dismissal; to the jurisdiction of industrial tribunals. It would leave undefined at law the status of trade unions, employer's associations, and the Advisory Conciliation and Arbitration Service. It would mean actively withdrawing rights of employees regarding redundancy, disclosure of information and in pregnancy. In short, the effect would be extremely disruptive and a vacuum would be created which it might well prove difficult to fill satisfactorily. Whatever the popular appeal of protecting individual rights, it would probably be more than offset by the opposition which outright repeal would evoke from all quarters.

(iv) TUC advice

25. From time to time the TUC issues advice to its member unions on important matters. The letters sent out by the General Council during the currency of the first Social Contract drawing members' attention to the terms are one example. The TUC might choose, or be encouraged, to issue such advice on the negotiation of union membership agreements. This could include a recommendation to provide a 'conscience' clause similar to Lord Hailsham's wording - i.e. individuals would be allowed to remain outside union membership if they did so on grounds of sincerely held personal conscientious conviction not motivated by hope of financial gain or material advantage. They could also issue advice on rules and procedures to restrict the possibility of unfair treatment short of exclusion or expulsion. The TUC have already - albeit grudgingly - set up their own 'independent' appeals procedure to cover complaints relating to exclusion or expulsion from a closed shop. There are three strong objections to this option. Firstly, there is no obligation on individual unions to follow TUC advice: the only sanction is expulsion from the TUC. They could ignore advice on union membership agreements. Secondly, the 'independence' of a TUC appeals procedure is highly questionable, (some agreements already bypass the TUC appeal procedure by writing in a right of resort to the ACAS.) Thirdly, the TUC cannot be compelled to issue advice, and they might be unwilling to issue their guidance on their own initiative on the grounds that it would be undue interference in internal union affairs.

(v) ACAS Code of Practice

26. Under the Employment Protection Act, the Advisory Conciliation and Arbitration Service has "a general duty of promoting the improvement of industrial relations". It is empowered to issue Codes of Practice containing such practical guidance as the Service thinks fit for this purpose. The Service has complete discretion on the subjects it chooses, apart from a specific obligation to issue a code on disclosure

of information and a further code on time off for trade union duties. Such Codes would be admissible in evidence at the proceedings of an industrial tribunal or the Central Arbitration Committee, and may be taken into account by them in determining questions.

27. The Council of the ACAS could be encouraged to issue a Code of Practice on union membership agreements indicating that such agreements should include:

- (a) a conscience clause,
- (b) an external independent appeals procedure for those expelled or excluded from union membership and for those who wish to claim exemption on grounds of conscience.

If an agreement did not include these provisions, and an individual was dismissed for failing to comply with it, he would be able to go to an industrial tribunal and call this in evidence in a claim for unfair dismissal.

28. This same approach could be adopted towards the question of union rules and procedures more generally.

29. Both the ACAS Code of Practice and TUC advice options suffer from the disadvantage that the Government cannot require the bodies to produce them as the law stands. It might be possible to attempt a hybrid approach similar to the Government's present pay-policy, whereby TUC advice achieves semi-legal status by association in a White Paper, but this approach is less likely to be available to a Conservative Government. More easy, perhaps, would be to amend the Employment Protection Act to place a specific duty on the ACAS to provide Codes of Practice on the subjects of union membership agreements and trade union procedures and rules.

#### VII Recommendation

30. It is proposed that an incoming Conservative Government should initially encourage and if necessary require the Advisory Conciliation and Arbitration Service to produce codes of practice:

- (a) on negotiating union membership agreements;
- (b) on union rules and procedures.

In the interim, Conservative spokesmen should remind employers that they cannot be legally forced into concluding closed shop agreements and reassure the non-unionised majority of employees that the new law does not mean that they must all join a union. Further, they should deplore the negotiation of all closed shops which lack protection for individual freedom, and in particular those in the public sector. The ground should be prepared for eventual action by ACAS by indicating that we believe that the problem should be referred to that body.

APPENDIX II

Sir Keith Joseph's guide lines of 15th July  
1975 related to proposals on Employee  
Participation

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Minimum Public Spending:	Some expansion of the ACAS and training: unquantifiable pay-back in improved industrial relations. General support for tax incentives for certain forms of financial participation designed to improve motivation and pro- mote greater efficiency.
Minimum Legislation:	Minor changes in Company Law.
Reduction of Inflation:	Profit sharing and better understanding of long term self-interest might reduce wage pressure.
Spread of Ownership:	Profit sharing and acquisition of shares.
Greater Responsibility:	Essence of participation.
Improvement in Standards:	Management by consent. Democratic procedures. Motivation.
Themes:	Common purpose of all at work. Resolution of conflict through co-operation. Property owning democracy. Loyalty to the enterprise. Development of the aspirations of the individual employee.