

REPORT FROM CRoW WORKING GROUP TO BCA AGM 2014. APPENDIX 1.
THE POSSIBLE APPLICATION OF CROW TO CAVING

1. Section 2(1) of the Countryside and Rights of Way Act of 2000 (CRoW) states “Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation...” subject to various conditions. The key phrases are therefore are ‘access land’, ‘open-air’ and ‘recreation’. The purpose of this note is to review legal interpretations of the meaning of each phrase. CRoW only applies to England and Wales. Scotland has it’s own law which explicitly covers caving. Northern Ireland has no equivalent law.

2. Access land is defined in subsection 1(1) of CRoW as:

In this Part “access land” means any land which—

- (a) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of this Part,*
- (b) is shown on such a map as registered common land,*
- (c) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued,*
- (d) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued, or*
- (e) is dedicated for the purposes of this Part under section 16,*
but does not (in any of those cases) include excepted land or land which is treated by section 15(1) as being accessible to the public apart from this Act.

3. In England, a number of caves have been identified as being on ‘registered common land’, notably in the Dales at Ingleborough and Clapham. In addition, it is known that many of the Forest of Dean sites are on Forestry Commission land which is ‘dedicated land’ under section 16. Land over 600m is easily identifiable and excludes anywhere on Mendip. A slightly closer look at land above 600m in areas of potential interest to cavers and miners indicates that few other cave or mine entrances lie on land above 600m. But the vast majority of caves and mines on access land are likely to lie on land which has been identified as ‘open country’.

4. Subsection 1(2) of CRoW helpfully defines ‘open country’ as:

“open country” means land which—

- (a) appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and*
- (b) is not registered common land.*

And also defines ‘appropriate countryside body’ as:

“the appropriate countryside body” means—

- (c) in relation to England, the Countryside Agency, and*
- (d) in relation to Wales, the Countryside Council for Wales;*

5. Parts of the Countryside Agency were subsequently merged with parts of other bodies to form Natural England (NE) who now holds this role for England. In Wales, the Countryside Council for Wales was merged together with functions from other bodies into the body known as Natural Resources Wales (NRW).

6. This definition of 'open country' mirrors that used in section 59(2) of the National Parks and Access to the Countryside Act of 1949 as passed, though not as amended by the Countryside Act of 1968. (That extended the definition to cover woodland, rivers and canals and their watersides.) It is perhaps expected that in the first major debate following the introduction of the bill for the National Parks and Access to the Countryside Act there was even then protests about the limited intent of the bill. The late Barbara Castleⁱ said in that debate *"We have tended in the past to consider that the working-class enjoyment of the open air must necessarily and permanently be limited to hiking and cycling. That is not the vision we get from the Hobhouse Report."* (The Hobhouse report proposed the basic structure for the National Parks and Access to the Countryside Act.)
7. A key feature of the definition of 'open country' is that it means land of certain types. And provided it is land of one of those types, it is therefore 'access land'. So the word 'land' is qualified by access to produce the phrase 'access land' which comprises of certain types of land as defined in section 1(2). Common law reaffirmed as recently as 2010ⁱⁱ states that the owner of land owns from notionally the centre of the earth to the skies above. This position also provides for clarity where a cave is sufficiently long to extend beyond the land of one land owner. Simply put, each land owner owns that part of the cave which lies on their land.
8. This common law position is reinforced by the Law of Property Act of 1925 which at section 205(1)(ix) defines land as including *"...mines and minerals, whether or not held apart from the surface"* and goes onto state *"mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . ."*. Indeed this definition was slightly amplified in the Land Registration Act of 2002 where in section 132(1) it states that land includes *"land covered with water, and mines and minerals, whether or not held with the surface"*.
9. Hence it is proposed that in law 'access land' means not only the surface but also what is below that surface. And that it matters not whether access land was defined on the basis of it being 'open county', 'registered common land' or 'dedicated land'.
10. It is also worth reflecting that given the definition of land also includes above the surface. So in theory a person could use the above surface space. Except that CRoW specifically excluded from the right of access the activities of hang-gliding and para-gliding under paragraph 1(s) in Schedule 2. (CRoW does not exclude kite flying so it is clear that not all above surface activities are prohibited.) NCA's submissionⁱⁱⁱ to the consultation paper which preceded the CRoW bill made clear that we viewed the bill should cover caving. The subsequently published paper^{iv} on responses specifically mentions that at least response mentioned CRoW should cover caving. So clearly the lawyers who drafted the bill were alert to the fact that the definition of land included both above and below the surface and its implications. And by implication, that they consciously chose to not exclude land below the surface and hence include the caves which might lie therein.
11. The Physical Training and Recreation Act of 1937 contains no definition of recreation but consistently uses the phrase 'physical training and recreation' and 'exercise and recreation', suggesting a relationship between exercise and recreation. The Education and Inspections Act of 2006 includes a section which is intended to amend the Education Act of 1996 by the addition of a new section which at subsection 157(B)(13) contains the not overly helpful definition that *"recreation" includes physical training (and "recreational" is to be construed accordingly)*. A search using Westlaw UK facilities^v on the word 'recreation' by itself produced a large number of hits. When limited to those associated with land, many turned out to be related to planning applications and the meaning of sport and recreational facility within planning guidance.

12. However, The Work at Height Regulations of 2005 (No. 735) in paragraph (4) (d) of at regulation 3 includes the phrase “...caving or climbing by way of sport, recreation, team building or similar activities”. It goes onto to usefully note in paragraph (6) (a) that “caving” includes the exploration of parts of mines which are no longer worked”. This is in line with the membership of the British Caving Association (BCA, the national body for caving in the United Kingdom of Great Britain and Northern Ireland) of the Sport and Recreation Alliance. (The Sport and Recreation Alliance is the umbrella organisation for the governing and representative bodies of sport and recreation in the UK, being the successor to the Central Council of Physical Recreation.) Sport England also recognised caving as a sport and BCA as the national governing body. And as a consequence, HM Revenue and Customs accept that suitable caving clubs can apply for Community Amateur Sports Clubs status. Thus it is concluded that the law does recognise caving as a recreation.
13. A search on the phrase ‘open air’ by itself also using Westlaw UK facilities identified only one case of interest. This was based on a request for an open air cremation by a Hindu. The judicial review judgement indicated that the phrase ‘open air’ is not applicable when inside a building. Paragraph 14 of Schedule 1 of CRoW usefully defines building as “includes any structure or erection and any part of a building as so defined, but does not include any fence or wall, or anything which is a means of access as defined by section 34; and for this purpose “structure” includes any tent, caravan or other temporary or moveable structure”.
14. This affirms that ‘open air’ cannot be inside a building and other manmade structures. But can ‘open air’ be inside natural things such as a cave or man made things such as a mine? Subsection 93(4) of the Environmental Protection Act of 1990 states “open land” means land in the open air”. And interestingly subsection 1(2) of the Environmental Protection Act states “The “environment” consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.” Which seems to imply that the air within caves and mines is not ‘open air’. Reading several cases involving mines indicates that the phrase ‘open air’ is used to denote locations on the surface of the land^{vi}.
15. So open air recreation is recreation which is carried on in the open air and not in a building, structure or other enclosed space such as a cave or mine. It is a statement of the obvious that many recreations can be conducted in the open air as well as inside buildings, a simple example being dancing. Normally caving would be conducted beneath the surface, underground. But there are a few caves with entrances which require caving techniques whilst still very much in the open air. So caving is undertaken in the open air and hence can be described as an ‘open air recreation’ in such circumstances.
16. NE is reported^{vii} as “...still not convinced that caving is an open air activity (or even that it takes place in the outdoors, for that matter). What they have conceded is that cavers do have the right of access (under CRoW) to open caves and potholes on the sides of mountains and the like, because they are in effect open to the air.” It has also been reported that Natural England have stated in an email^{viii} that: “It is the view of our Access Specialist that it’s pretty clear that in common parlance, the term “open-air recreation” wouldn’t be perceived to include use of areas under the ground. And this is what two different Defra lawyers thought (DEFRA’s view in 2001 referred to below). It might well be different where a large open cave sets in the side of a mountain, as for example sometimes happens in the Lake District. In such a case a person entering the cave still has a very real sense of open-air recreation. But once one is in effect disappearing down tunnels in the ground, it seems to me that one immediately loses that sense.”

17. The exciting feature of this information is that it appears that NE concedes that caving is an 'open air recreation'. But I suggest that they fall into the common misapprehension that the phrase 'open air' also qualifies the phrase 'access land'. It is suggested that most people have been interpreting the statement "...access land for the purposes of open-air recreation..." as if it read "...on any access land for the purposes of recreation in the open air...". But as noted in paragraph 9 above, the lawyers who drafted the bill were aware of the desire to see caving included. They did not see fit to explicitly qualify 'access land' by the use of 'open air' or to make clear they were explicitly talking about 'recreation in the open air'. My argument is that to take an example such as dancing, not only does CRoW give a person the right to dance on the surface of the 'access land' but because 'access land' also includes the caves below its surface, CRoW also give that person the right to dance in a cave. For dancing substitute caving.
18. It is therefore proposed that the working group seek legal advice on the merits of this argument, including if necessary to paying for that advice, subject to Council's agreement as to the specific costs. (One barrister has indicated a willingness to provide pro bono work, subject to work load.) If legal advice is favourable, it is proposed that the working group directly negotiate with Natural England and Natural Resources Wales.
19. It is acknowledged that if this line of argument is successful, then there are substantial implications for cave access agreements; simply put, most will no longer be legal. It is therefore proposed that subject to such legal advice being favourable, then the Working Group's terms of reference be expanded to include BCA's Conservation and Access Officer and that the working group take on the task of producing advice to regions on acceptable forms of access agreements under the new interpretation and any appropriate supplementary topics (such as educational material on cave conservation and early briefing notes for regions to use to keep land owners informed).
20. This paper has been based on a piece of work looking in some detail at CRoW, a copy of which is available on request. Further planned work includes reviewing the impact of CRoW covering caves on the liability of land owners.

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ⁱ See <http://hansard.millbanksystems.com/commons/1949/mar/31/national-parks-and-access-to-the> .

ⁱⁱ See para 10 to 28 in http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0032_Judgment.pdf .

ⁱⁱⁱ NCA, Access to the Open Countryside – A Consultation Paper, Comments of the National Caving Association, Proposal 15, 1998.

^{iv} DETR, Access to the open countryside in England and Wales : analysis of responses to the Consultation Paper : executive paper, February 1999.

^v See <http://legalresearch.westlaw.co.uk/> .

^{vi} See for example Mackenzie v Coltness Iron Co. Ltd, (1903) 11 S.L.T. 350.

^{vii} T Allen, Cave Access – Out in the Open, Descent (237) p30 to 32, April/May 2014.

^{viii} See <http://ukcaving.com/board/index.php?topic=16409.msg214924#msg214924> .

Web addresses as at 29 April 2014