



Advice to Access Controlling Bodies on CRoW and related matters

The Countryside and Rights of Way Act 2000 (the Right to Roam) gives the public a right of access to access land for the purposes of open-air recreation. The question asked of the BCA is, “does the Act apply to caving?” and if so what are the consequential actions Access Controlling Bodies (ACBs) might take.

History

There was a consultation process prior to the introduction of the Act, and the National Caving Association (as BCA was at the time) formally responded and supported the inclusion of caving under the Act. CRoW identifies access land by a map. Under law reaffirmed as recently as 2015, the map captures not only the surface but also the land below the surface as well as the space above the surface. Thus caves are caught by the map, as is the case for designating a Site of Special Scientific Interest or Scheduled Ancient Monument. During the passage of the Bill through parliament the government made it clear that there would be a list of ‘general restrictions’ which would identify activities which were not permitted by right. Caving is not included in this list. However, when the Act came into force in 2005 both Natural England and Natural Resources Wales (or their predecessors) took the view that the Act did not apply to caving as it was not an ‘open-air recreation’. Following a great deal of discussion over the years, a detailed examination of the parliamentary process and a QC’s legal opinion both suggest that they are wrong in taking this view. This in turn led to the BCA polling its entire membership on the question, “*Should BCA, on your behalf, campaign for The Countryside and Rights of Way Act apply to going underground?*” The membership returned a clear majority in favour and that campaign is now well underway. BCA has been asked by several Access Controlling Bodies (ACBs) what they should do. Whilst the application of the CRoW Act to caves remains in dispute, ACBs who are concerned may wish to undertake some preparatory work. Should the ACB have concerns over the potential change in access to caves within their control they may wish to consider the following advice.

Action

1. The BCA recommend that ACB’s check whether any cave entrances under their control are located on surface land which is subject to CRoW.
<http://www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps>.
2. They should further check that none of this land is ‘excepted land’, ie within a building or its curtilage. For more details see <https://www.gov.uk/guidance/open-access-land-management-rights-and-responsibilities>.
3. They should also check on the status of the land as to whether it is access land as defined under Section 1 of the Act being either “open countryside” or “common land” or whether it is open access land being defined under Section 15 “common land” or dedicated land under Section 16. An indication of the status can be obtained from <http://magic.defra.gov.uk/> using the mapping facilities under the access contents.
4. ACB’s should carefully consider the points made below. In particular attention is drawn to current government advice and the process to restrict access on conservation grounds if that advice changes.



Points to note

1. The Act states that any person is entitled to enter and remain on any access land for the purposes of open-air recreation. Current DEFRA advice is that this includes access to cave entrances and in the case of open caves and potholes to an indeterminate point inside the cave. It has been suggested by Natural England that this is to the limit of daylight. Therefore cavers already have a right of access to the entrance and the entrance area of caves situated on access land.
2. ACBs should prepare for the future and consider what changes they would be required to make if CRoW is accepted as applying to all of the cave. NE or NRW or the National Park Authority can issue a Direction which can modify or remove the right of access under CRoW. It is clear that any successful application for a Direction needs to have a good justification as well as having done some ground work with bodies who are likely to be consulted by NE or NRW plus the land and mineral rights owners.
3. Caves caught by Section 15 may be on land which has had limited access rights granted specifically not including below the surface / underground (it is understood that Burrington Combe, Mendip is such an example). If the grant of rights does not include below the surface, then the caves are not subject to the 'Right to Roam'.
4. The BCA recommend that ACBs maintain, and seek to improve, access to caves and sites of speleological interest and that access is granted as freely as possible for all responsible cavers. The BCA notes Natural England's and Natural Resource Wales' statutory advice on restrictions to access which states that the least restrictive option to meet the need should be preferred.
5. ACBs should carefully consider all conditions of their access agreements. Certain conditions should be advisory rather than conditional for access where there is a right of access already. Numbers of cars parking on a public highway and specific walking routes across access land are two such examples.
6. At all times landowners should be treated with courtesy and respect. A major concern for landowners who allow cavers access to caves is their legal liability. Under CRoW their liability is reduced to the lowest possible in law which given DEFRA's current advice would also include walking to the cave entrance, the entrance area and entry to an open cave or pothole for a limited distance as described above.
7. Conservation relates to all caves not just those on access land. The BCA urges cavers to follow the Minimal Impact Code. If CRoW does apply to caving as the BCA contends, there may be a justification for a restriction to access on conservation grounds. ACBs should refer to section 26 of the Act, the statutory guidance and the BCA summary included below.



Section 26 Advice

It is unlikely that a section 26 application will be accepted prior to any change in the government's current view of CRoW. However, if any ACB consider that a restriction might be necessary in order to protect a cave, then some preparatory work is advised. For example:

1. Make contact with your NE/NRW area representative;
2. Determine precisely which section of the act the cave is caught by;
3. Consider who might be consulted if an application goes ahead;
4. Take an interest in your Local Access Forum;
5. Look at any other restrictions which already apply to your area;
6. Refer to "Applying for a Direction under section 26 of CRoW" attached.

The process of issuing a Direction is covered by guidance issued by NE and NRW. The guidance specifically includes the issue of 'temporary' Directions whilst a 'long term' Direction is being subjected to consultations process.

Similar processes apply to caves where significant concerns arise over public safety or land management issues such as water supplies) using alternative Sections of CRoW. The discovery of new cave or passage on CRoW land worthy of protection can be coped with under the various processes provided for by the guidance and additional measures, including the land owner using their rights to restrict access for up to 28 days.

The BCA appreciate the work Access Controlling Bodies do on behalf of cavers and hope that this advice is both constructive and beneficial. Please do not hesitate to contact me for further clarification if required.

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Applying for a Direction under Section 26 of CRow

Section 26 covers nature conservation and heritage reasons for excluding pieces of land from the right of access granted by CRow. In detail, Section 26 covers conserving flora, fauna or geological or physiographical features of the land in question or preserving any Scheduled Monument (SM) and archaeological areas or any other structure, work, site, garden or area which is of historic, architectural, traditional, artistic or archaeological interest. In the context of a cave, restriction of access could be implemented for the purposes of conserving primarily, geological or physiographical features and possibly, in some instances, for conserving flora and fauna inside the cave and/or at the cave entrance.

Section 26 require a Direction to be given by a relevant authority acting on the statutory guidance of an advisory body. The 'relevant authority' is either Natural England (NE) or Natural Resources Wales (NRW) unless the land is within a national park in which case it is the National Park Authority or if on Forestry Commission land in which case it is the Forestry Commissioners. The advisory body for the conservation of flora, fauna, geological or physiographical features is either NE or NRW and for the preservation of historic, archaeological features, etc it is English Heritage (EH) or National Assembly for Wales (NAW). In all cases, applications should be sent to either NE's Open Access Contact Centre for England or NRW's Access team for Wales in the first instance.

Statutory guidance has been issued by NE (1) and NRW (2). The detailed process for applying for a Direction is different in England and Wales but has the same basic pro-cesses at its heart. The process is based upon an underlying policy of using the 'least restrictive option' if any is to be applied.

It is possible via direct agreement between cavers and interested parties, that mitigation measures can be put in place without the need for applying for Direction under section 26. This may be simplest and quickest means of mitigation and thus immediate protection, after which interested parties can then consider any further course of action and whether to apply or not for Direction under section 26.

If existing mitigation measures are deemed unsuccessful and features of conservation/preservation value are at risk then Direction may need to be sought. However, the relevant body, before giving Direction, will consult with a range of interested parties be-forehand to check on the significance of the reasons for the application. Directions, if and when given, can be either for short term or long term periods. At a later date they can be either reapplied, altered or revoked. Directions may affect the wider public and thus there may be the need to consult with the public/interest groups represented in Local Access Forums.

The process of applying for Direction should take less than 4 months to allow the application to be seen by the next meeting of the Local Access Forum but these forums can (and do) ask for a delay whilst it consults. There is also a consultation with the appropriate national governing body (such as Ramblers or BMC) if a specific activity is involved. Normally, 'long term' Directions only last 5 years before being reviewed. The decision is published on the web with sufficient information to identify the location, the purpose of the Direction and the nature of the restriction. The guidance material does include a reference to the issue of 'temporary' Directions if restrictions are required whilst the consultation process is being conducted.



There also is the potential for a new find requiring restrictions from 'Day 1'. A Section 26 application can be made by any person, so the process could be initiated very quickly by a prepared region. The land owner can use their right under Section 22 to issue a Discretionary restriction which can cover up to 28 days subject to an up to 5 day period for NE to process it before the Discretionary restriction starts. Alternatively, the land owner can issue a Discretionary restriction for up to 4 days with just 2 hours notice.

It is clear that a successful application needs to have a good justification as well as having done some ground work with bodies who are likely to be consulted by the appropriate advisory body and landowner. Clearly being included as a 'caving' Site of Special Scientific Interest (SSSI) or SM is a major advantage if one is claiming conservation/preservation grounds, but there needs to also be a demonstration of why control of access is required on conservation grounds, given that many SSSI caves across the country have seen no need for access control. It should be noted that a Direction will only exclude a piece of land from the right of access granted by CRoW. Thus, it does not stop the land owner from granting access under conditions that the land owner may wish to apply. (But those conditions will clearly have to show how that the cave is conserved. So an Access Controlling Body will amongst other things have to demonstrate their effectiveness in conserving the cave.)

Protecting the valued features from damage may require a series of mitigation measures varying from one extreme of no action necessary due to location to the other of total exclusion of cavers from the system. This is dependent on the location of the features and the cave, the level and type of cave 'traffic' that the system may receive and the vulnerability/fragility of the features. Features may be found in 'pockets' within the system and even 'off the beaten track', out of site and unreachable and thus may avoid damage and disturbance. Others may be found throughout the system and on main trade routes or in locations that are easily accessible. Some systems, or parts of, are easily accessible to all: the non caving public, group use, novices, those with disabilities and experienced cavers alike and thus receive vast amounts of 'footfall' and subsequent erosion, handling and disturbance. In any of the above situations, there will be cases where, if features are damaged/disturbed their 'valued status' may be lost and irretrievable, others, however, may be repairable, retrievable or restored in time, to their former state.

If the above methods fail or are not attainable then alternative or additional means of protecting features need to be adopted. Information and notices, posted and circulated electronically on forums or via newsletters, etc informing the caving fraternity of an issue may help. Taping off features and/or interpretation/signage to inform cavers that there is something of value to be wary of, will offer some protection, but the measure may need monitoring, reviewing to establish whether it is successful or needs tweaking or further protection measures.

Protection via offering an alternative route away from the feature at risk, may be an option in some systems. Barring entry to an area, using gates is the ultimate means of protection. Gates at entrances that have a locking system that can be opened by cavers 'in the know' but not by the general public and uninitiated, e.g. the bolt, nut and Derbyshire key or spanner arrangement, work well. Such systems are likely to just come within CRoW. However, a gate and lock that requires a key or code can only be used in conjunction with a Direction.

(1) http://webarchive.nationalarchives.gov.uk/20140304112715/http://www.naturalengland.org.uk/Images/RAG%20V4%20for%20website_tcm6-12375.pdf

(2) <https://naturalresources.wales/out-and-about/recreation-and-access-policy-advice-and-guidance/managing-access/restrictions-on-access-land/?lang=en>

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