IN THE MATTER OF THE APPLICATION OF THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000 TO CAVING
AN ALTERNATIVE VIEW

1. Dinah Rose QC ("Counsel") has provided an opinion to certain individual members of the British Caving Association (BCA) on the application of the Countryside and Rights of Way Act 2000 (CROW) to caving. In considering this opinion, the adversarial nature of English law must always be borne in mind. In every case to come before a judge (or jury in criminal cases), there are two parties with opposing views, and those parties must seek to establish the truth of their case or their interpretation of the law. It is for the judge to decide which party has done that. Thus English law is, in essence, a contest between two opposing sides, and at the end of the day, only side will emerge the winner, but in many cases, both sides will field QCs to argue their view of the law.

A QC's opinion is therefore just what it says, it is an opinion. In this case, Counsel was briefed by a group of individuals, some of whom have a particular view and who have been pressing that view for some time. It therefore comes as no surprise to find that Counsel's opinion accords with that of those who provided the brief. However, it is demonstrably the case that certain matters do not appear to have formed part of Counsel's brief or, if included, were not given sufficient weight and, in addition, there are other areas where a different construction of the words used will enable a different conclusion to be reached. Unless something has been referred to in Counsel's opinion, it is impossible to tell whether it has been considered or not, therefore this analysis can only concern itself with the statements that have been made.

This report has been prepared by Linda Wilson (retired solicitor, non-practising), at the request of David Judson (Convenor of the BCA's Legal & Insurance Committee), after detailed discussion with him, and is being presented jointly with him.

2. In section 2.1 of her Summary of Conclusions, Counsel states:

> "Cave systems that are situated in an area consisting predominantly of mountain, moor, heath or down which has been identified as "open country" on a map produced by the appropriate authority are properly to be regarded as forming part of that open country, to which the right of access under CROW applies;"

However, it is clear that cave systems cannot be defined as being any of these four elements of the countryside, therefore they cannot be said to have formed part of the original legislative intention. Whilst a cave or part of a cave might lie beneath mountain, moor, heath or down, it does not consist of any of these and is, in fact, a wholly separate entity to which wholly separate considerations apply.

3. Counsel then considers the recreational nature of caving and whether caving is an "open-air recreation". As she admits, the term is not defined in the Act and further admits that its scope is not entirely clearly. But, as Counsel notes, a narrow reading of the term would exclude caving and she is of the opinion that this does not accord with the purpose of CROW.

The fundamental problem with this opinion is that it presupposes CROW was intended to cover caves. From the opinion that has been given, the brief to Counsel does not appear to have made any reference to the deliberations of the National Caving Association (NCA), the national body for caving at the time of the prior consultations, or if such reference was made, then insufficient weight has been given to the submission. Counsel's opinion does not reflect the advice and input at the time from the national body, which was against the inclusion of caves in the legislation. The matter was discussed extensively by the NCA when legislation was proposed and the consensus then was that caves should not be included within the ambit of CROW for reasons of conservation, safety and landowner relations. NCA lobbied against any application of CROW to caving, and this is reflected in the fact that the Act refers solely to "open-air recreation".

It should also be noted that in this context, "open-air" can equally be read in the sense of being the opposite of two common antonyms, namely "enclosed" and "confined", and caves are both.

4. Counsel says that:

> "Excluding caving from the definition on the ground that caves are underground tunnels would lead to arbitrary distinctions."

Including caves within the ambit of CROW will lead to other, equally, arbitrary distinctions, of the type that Counsel is clearly seeking to avoid. Cave systems are not constrained by surface boundaries. They can lie beneath land in a variety of different ownerships, and an entrance on CROW land can lead to a cave system that is not under CROW land. Therefore by allowing access under CROW, access is, de facto, being allowed to land not covered by CROW and that was never intended to be covered by CROW. In addition, that cave systems have not been mapped as part of the statutory process of defining access land (the fact that they may have been mapped in other contexts by cavers is not relevant when considering the statutory framework of the Act) and therefore they cannot form part of access land. This is the view held by the Department for Environment, Food and Rural Affairs (DEFRA).

There is a further material point that needs to be considered in this context. CROW gives greater protection to landowners in the event of a personal injury claim, but no such protection is afforded to other landowners whose cave systems would be accessible without restriction and such landowners would be at risk of an action without being able to rely on the protections CROW confers, despite the fact that it would be CROW that had facilitated access to their land. This is an important matter of public policy that Counsel's opinion wholly fails to address. As Counsel states on the principles of statutory construction: "An interpretation which leads to an arbitrary or absurd result should be avoided."

5. Counsel says that:

> "There is no good policy reason for permitting access to a cave entrance or open shaft, but not to an underground passage; or for permitting climbing and similar activities on access land, but not caving."

Counsel has either failed to recognise, or was not briefed on the fact that there are wholly different conservation considerations that apply to cave sites that do not apply to any of the other activities mentioned in this paragraph. Many cave systems contain fragile formations and deposits, and access systems have been put in place for a variety of different reasons, such as the need to protect the cave, and also for reasons of public safety. Many caves are designated as Sites of Special Scientific Interest and even in some cases as Ancient Monuments, and both the site designations and the lists of Potentially Damaging Operations are different for underground and over-ground sites, therefore the two cannot simply be regarded as one and the same.

If caving was intended to be covered by CROW, then it can just as easily be argued that this would have been made explicit in the Act, as it is in Scotland, where the situation is wholly different and there caves are explicitly within the ambit of the relevant Act. The Land Reform (Scotland) Act 2003 states, in Section 1(6) "Access rights are exercisable above and below (as well as on) the surface of the land." If CROW had been intended to apply to caves in England and Wales, then the way was open for the inclusion of simple wording of this type to have been used. Scotland has far fewer caves and at the time the legislation was enacted, no restricted access systems, therefore wholly different policy considerations applied.

In England and Wales there is a perfectly good policy reason for restricting access to a cave system even though the entrance area remains accessible. In a large number of cases, the conservation (and safety) considerations do not necessarily come into play until the caver has gone beyond the 'open air'. For these reasons, cave systems were never intended to be subject to the provisions of CROW.

6. Counsel concludes the section headed "Summary of Conclusions" by saying:

"the right of access granted under CROW should properly be read as applicable to access to land for the purpose of recreational caving."

For the reasons stated above, it is clear that Counsel's opinion has not properly considered the whole legislative context, in particular the contrast between the law in Scotland and in England & Wales, and the views expressed at the time on behalf of the national body. Nor has it addressed the problems of the mapping of cave systems in the context of CROW or taken any account of the fact that rights granted on one area of land could lead to unauthorised access in another area, for which reasons, DEFRA has stated unambiguously that in their view, caving is not covered by CROW. Nor have the conservation or safety reasons as expressed in the consultation process by the then national body been considered as a reason why caving was not explicitly included in the Act.

7. In the section headed "The Statutory Framework", Counsel acknowledges that the central issues with which her opinion is concerned are the meaning of "access land" and the meaning of "open-air recreation" and refers to the fact that access land includes land which is shown as "open country" on "a map in conclusive form issued by the appropriate countryside body for the purposes of Part 1 of the Act".

Whilst some caves entrances are shown on such maps, the caves themselves are not. These maps do not extend to any areas underground, nor do they show the cave

system in relation to any overlying land, therefore in the absence of a specific statement to include the underground, such as the one in the Land Reform (Scotland) Act, any argument for their inclusion has to be open to serious doubt, as caves cannot be said to meet this definition of access land.

Also in this section, Counsel refers to the Hobhouse Report, which preceded the National Parks and Access to the Countryside Act 1949, making mention of caving within the context of open air recreation, and this is used as an argument in favour of seeking to include caves within the ambit of CROW. However, this argument does not take account of the fact that at the time of the Hobhouse Report, there were few, if any, caves covered by the sort of access agreements that are common today, and little recognition of the need to restrict access for the purposes of both conservation and public safety. Thus the Hobhouse Report and its mention of caving needs to be read in their then context, and it needs to be understood that this context had changed greatly in the 50 years that led up to the enactment of CROW.

8. In the section headed "Open Country", Counsel says that:

> "There are, however, at least two instances (Eldon Pot in Derbyshire, and Marble Steps in Yorkshire) in which the cave entrance has been excluded (for unknown reasons) from the area identified as open country on the map. In those cases, the requirements of section 1(1) would not be met, and the cave entrance would not be situated in open country as defined in the legislation."

As has been demonstrated above, the national body for caving considered and lobbied against the idea of access rights applying to cave systems, therefore when the maps were being drawn, some cave entrances that were large enough to have been marked on the maps were excluded. This was not for unknown reasons, although it appears that the reasons were unknown to Counsel. The exclusion of these entrances provides a clear indication of the original legislative intention to exclude caves from the definition of "open country". If that was not the intention then there would be no reason for the exclusion of these two entrances.

Also in this section, Counsel turns again to the question of mapped land and disagrees with an opinion offered by Natural England and DEFRA that caves systems cannot be regarded as being covered by the CROW maps of mountain, moor, heath, down because the content of the maps is "driven by what is on the surface of the land as opposed to what is underneath it". Counsel considers this argument to be wrong in law and prefers to consider caves as being within the definition of "open country" if they are in an area which predominantly consists of such features. Again, by adopting such an approach Counsel is failing to take account of fact that other features such as rock crags are shown on the relevant maps, whereas as demonstrated above, cave system, are not shown on the maps, as the maps in question do not extend below the surface of the ground and therefore cannot reasonably be brought within this definition.

In the section headed "Open-air Recreation", Counsel seeks to set differing dictionary definitions into the context of the Hobhouse Report, referred to above, however, as already stated, the Hobhouse Report was written some 50 years before CROW was enacted. The need to conserve and protect certain caves had not at that time received

much, if any, consideration, whereas CROW was enacted against a very different conservation ethos and legislative background, in particular The Wildlife and Countryside Act 1981.

Counsel returns again to the seeming illogicality of excluding caves from the ambit of CROW but the intention of Parliament can be seen in a completely different light when it is understood that at the time, the national body for caving was not lobbying for the inclusion of caves within the ambit of CROW, and that quite to the contrary, its view then was that caves should be excluded from it.

Counsel cannot understand why Parliament should have sought to

> "*include* within the scope of CROW caves which are "open to the sky", on the side of mountains, or with open shafts, but to *exclude* cave systems with underground passages. The distinction is unprincipled. It tends to undermine the policy of the Act, by placing an arbitrary restraint on some forms of caving but not on others."

The exclusion of Eldon Hole and Marble Steps demonstrates that Parliament did intend to exclude such large open entrances from the Act. It is simply the case that not all such large, open entrances ended up being marked, most likely because they were not marked in such a way as to be picked up by the draftsmen when the maps were drawn. All Natural England have done in the cited correspondence is to acknowledge, with some obvious and evident reluctance, that the Act could possibly be read in such a way.

The alternative view of 'enclosed' and 'confined' has been put forward above, as has an explanation for why Parliament did not intend to include caves within CROW, and it will be seen that taken in this context, the interpretation is neither too technical nor too narrow, nor is it in any way irrational.

9. In the section headed "Conclusion" Counsel admits that:

> "The matter is not entirely free from doubt, since the term "open-air" is undefined, and may carry different shades of meaning."

It is clear from this that, as ever in English law, there is more than one way of interpreting an Act of Parliament. As has been demonstrated above, there are alternative meanings that Counsel has not considered, and reasons for the exclusion of caves from the legislation that do not appear to have formed part of Counsel's brief. However, as both Natural England and DEFRA have stated throughout the correspondence, the final and only arbiter is in fact a court of law.

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