

# **Why it's time to reform access arrangements for caving**

**Representations to the Welsh Ministers (WM), Natural Resources Wales (NRW) and the Department of the Environment, Food and Rural Affairs (Defra) on behalf of the British Caving Association (BCA)**

**By David Rose and the BCA Access Reform Working Party**

**February 1, 2022**

## **Introduction**

1. This document follows the consent order agreed between the parties and sealed by the High Court on December 8, 2021, which settled the judicial review litigation between David Rose representing the BCA and the WM (case CO/1484/2020). NRW and Defra were interested parties. The schedule to the order states:

‘The Claimant may, as advised, within 56 days from the date of this order, provide the Defendant with representations as to whether and how the Defendant should reform access arrangements for caving including whether the Access Reform Advisory Group (ARAG) or an equivalent advisory body should be commissioned to consider and advise on the potential for, merits of, and practical implications thereof.’

2. We explain here why it is indeed time to reform these arrangements, either by accepting that caving falls within the scope of the Countryside and Rights of Way Act 2000 (‘the CROW Act’) and its ‘right to roam’ provisions on what we refer to as ‘CROW Access Land’, or by amending the legislation to ensure that it does. WM should do so forthwith, subject possibly to asking ARAG or an equivalent body to consider and advise on practical issues arising from a change of approach. We remind WM that Wales contains many of the most important cave systems in Britain, including the deepest, Ogof Ffynnon Ddu, and the second longest, Ogof Draenen. Overall, dealing with this issue is of the utmost

importance for proper use and appreciation of the great natural environment that Wales has to offer.

3. The application of the CROW Act to caving was indeed not resolved in the recent litigation. It is open to WM to agree that it does apply to caving, but even if it considers it does not, there is still a strong public interest in caving being permitted on CROW Access Land, so that in any event current arrangements need reform, if WM consider necessary, by amending the legislation. As we point out below, this would be entirely consistent with recommendations of ARAG in relation to other outdoor activities.

#### **ARAG, the CROW Act, and cavers**

4. ARAG excluded caving from its scope soon after its inception, so necessarily its final report does not mention caving because caving was not a topic which it explored. However, ARAG's final report is now complete, and its first recommendation is that the Welsh Government should extend the right to use CROW Access Land which is so germane to the issues here. Specifically, it states that 'as a minimum', the rights of access should be increased for horse riders and cyclists, and possibly other activities such as paragliding – all of which are presently excluded from the scope of the Act under its schedule 2. The report also stresses there should be 'equity' in rights of access for those engaging in 'responsible recreation'.
5. The ARAG report shows how the decision to exclude cavers from ARAG was unfair and discriminatory. There is nothing in the text of the CROW Act that specifically excludes caving as a restricted activity, while both cycling and horse riding are excluded under schedule 2. One of the interested parties, NRW, has accepted that the CROW Act's meaning in relation to caving is unclear, and should be clarified. Yet as above we were 'disinvited' from ARAG after first being asked to join it, on the grounds that the CROW Act, supposedly, does exclude caving. Cavers must now be given the opportunity to make their case, too.
6. The current situation simply does make sense: activities specifically excluded

from CROW Access Land rights are recommended for access, yet caving was not even invited to participate in the review of access reform when it is at least arguable that the CROW Act anyway permits CROW Access Land rights for caving.

7. As we explain below, there is no reason in principle to exclude cavers from CROW Access Land. Indeed, the contrary. So, WM should take practical steps to ensure that caving is permitted on such land. If, following further consideration, it takes the view that amendment to legislation is necessary, then it should do that – as it will presumably in any event be doing in relation to the other activities recommended for access by ARAG.

### **Why caving should not be excluded from CROW Access Land**

#### *The law*

8. First, we maintain as in the litigation that led to the consent order that the right to roam access provisions of the CROW Act already apply to caving. We do not dwell at length on these arguments here, because they have been made already.

#### *Passage of the CROW Act*

9. We draw your attention to the origins of the CROW Act: the Labour Party's long-held commitment to what it called 'trying to widen access to the countryside'. Following consultations that led to the Bill, the then-Minister commented that responses as to whether access should cover 'cyclists, horse riders, climbers, cavers and canoeists' had been 'mixed', stating:

The Bill provides a right of access to land for "the purposes of open air recreation". This term was not defined in drafting the Bill because we considered that a definition would be undesirably restrictive and unnecessary.

10. During the Bill's committee stage, an amendment was proposed that would have provided such a definition – 'activities usually carried out in the open air'. The then-Minister rejected it, saying: 'We are trying to allow everything that is not specifically excluded.' Caving is not specifically excluded under the CROW Act. Not a single MP or peer suggested it should be excluded during the passage

of the Bill. One peer stated expressly that his reading of the Bill suggested that caving would be covered by it.

*“Getting Outdoors”*

11. We invite you to consider the report *Getting Outdoors*, published by the Sports Council and the Outdoor Industries Association in 2015. This stated: ‘Outdoor recreation refers to any physical activity taking place in the natural environment.’ It made no distinction as to whether caving takes place ‘outdoors’ or in the ‘open air’.

*Defra’s “Landscapes Review”*

12. In September 2020, Defra published a Landscapes Review, examining access to national parks and areas of outstanding natural beauty, following an inquiry led by Julian Glover. The BCA had made representations to him. On page 81, it noted that the current position taken by Defra, NRW and the Welsh Ministers is that ‘cavers face restrictions on what is otherwise designated as CROW Access Land once they move beyond an unspecified distance beyond cave entrances’ – the limit reached by daylight. The report stated:

‘It feels wrong that many parts of our most beautiful places are off-limits to horse riders ... cavers ... and so on. We hope that as part of the Government’s commitment to connect more people with nature, it will look seriously at whether the levels of open access we have in our most special places are adequate.’

13. As noted above, ARAG has recommended that the Welsh Ministers should indeed widen access to such places for horse riders ‘as a minimum’ – but not, of course, for cavers (because it excluded caving from its remit).

*Overall*

14. The consent order provides an opportunity to revisit this issue with regard to caving, in line with the approaches taken by Parliament when passing the CROW Act, encouragement of all forms of outdoor recreation, and the Glover review.

## **Benefits of caving**

15. The above observations can be reinforced, if it were necessary, by considering the practical benefits of caving

### *Caving benefits physical and mental health*

16. On November 8, 2021, George Linnane was carried on a stretcher out of the top entrance to Ogof Ffynnon Ddu in the Brecon Beacons, after one of the longest successful rescues in British caving history. Seriously injured after a passage floor in the 60-kilometres long cave system collapsed, he was attended by members of eight regional teams who assisted the South and Mid-Wales Cave Rescue. In all 300 people answered the call to come to his aid, all of them unpaid volunteers, including 10 doctors. He is expected to make a full recovery.
17. The incident illustrated Britain's caving community at its best, just as the heroic rescue by British cave divers of the thirteen Wild Boars team footballers from a flooded cave in Thailand did in 2018. Many cavers, both cases demonstrated, are altruistic individuals who devote a great deal of care and time to honing the skills necessary to save human life when someone does get into trouble. Moreover, they do so at no cost to the public purse. Cave rescue teams are entirely voluntary, funded by donations.
18. After the rescue of George Linnane, the BBC website published a revealing article in which cavers in Wales explained their attraction to the sport.

'We're all very close... if something happened to you, you know the community would be there to help,' Gwenllian Tawy, 30, from Aberystwyth said. 'We explore places that not a lot of people get to see. What we are able to see is really special, it's an exciting activity and also a good workout.' Samantha Jones, 41, from Wrexham, added: 'When I tell people that I do caving as a hobby, they kind of go, "why would you want to go there?" but it's not as you perceive, it's not all tiny potholes, it's something beautiful down there too... exploring down there with the team and coming back up is really good for the soul. I've got a young family, so it just gives you just that little bit of time away when your mind isn't racing and you're in the moment.' The cavers interviewed for the article all stressed the importance of joining groups with the appropriate level of experience, in order to minimise

risk. They could be said to exemplify what ARAG termed ‘responsible recreation’.

19. Self-evidently, caving helps to promote fitness and physical health. Cavers planning a challenging trip will inevitably ensure their general fitness remains good, and caving is a healthy sport that provides a whole-body workout. The close-knit, supportive nature of caving groups is beneficial to mental health, too. The first rule novice cavers learn when they enter a wild cave system for the first time is: ‘Always look after the person behind you.’ In recent months, the national cavers’ internet forum, UKCaving.com, has hosted threads in which cavers have discussed how pursuing the activity had helped them recover from anxiety and depression, and then to maintain good mental health. Several contributors said this had declined as a result of the Covid-19 pandemic lockdowns, which made caving difficult or impossible. One contributor, Pete Hall, wrote early last year:

‘Being able to go caving is the medication required to cope with everything else that's going on... [A friend and I] went caving last night and the positive change that has had for both of us is huge. For me, it was a much-needed top-up of medication. For my friend who hasn't been caving since the first lockdown, it seems to have completely reversed a serious downhill spiral. I really hope that this positive impact lasts.’

*Caving benefits the wider community – at no cost*

20. NRW referred in its court pleadings to the dangers posed by caving and the consequent possibility of rescue. In fact, statistics compiled by the British Cave Rescue Council show that in 2019, the last pre-pandemic year, only 24 cave rescue call-outs in the whole of Great Britain were issued to assist cavers who had experienced an accident, become overdue or in other ways got into trouble, and all were dealt with by voluntary cave rescue teams. There were no fewer than 145 surface incidents in which cave rescue organisations assisted walkers and others on the mountains and moors above the caves. The South and Mid Wales Cave Rescue Team went to great lengths to rescue a sheep that had fallen down a ‘slip rift’ fissure on old coal mining land in early January 2022, and later in the same month the team conducted the successful rescue of a dog which had

fallen down a similar fissure in the Rhondda. The team has carried out numerous similar rescues in the past. Assistance was provided by volunteers at no cost to the public purse. And at the Gleision Colliery disaster in 2011, Mines Rescue called upon the South and Mid Wales Cave Rescue Team to help and cave divers were sent in to search for survivors beyond the flooded section (tragically, there were none).

*Bringing caving within the CROW Act will benefit landowners*

21. Some landowners are believed to be opposed to cavers having access under the CROW Act because they fear they could be liable if someone has an accident, on the basis that the landowner was liable for owning the entrance to a cave that was unsafe. But that is a misplaced fear. Section 13 of the CROW Act itself in any event removes the liability that landowners might otherwise have to maintain safe conditions for visitors to CROW Access Land. The ARAG report recommends that this removal of liability should be clarified and strengthened, but in principle it is there. Furthermore, the BCA provides insurance that indemnifies against that risk to all members and non-members and to landowners who grant cave access. This is no reason not to treat caving with the same 'equity' as that enjoyed by other recreational activities. There is no reason for concern on this front.

*Cavers benefit conservation and science*

22. NRW and Natural England sometimes work with cavers for conservation and scientific purposes, such as the study of bats. At the time of writing, NRW is collaborating with the Royal Forest of Dean Caving Club over the designation of Otter Hole in the Wye Valley as a new SSSI, an extremely rare occurrence. Otter Hole is a demanding, 'grade 5' caving trip, requiring a high level of fitness and experience, and inevitably NRW staff must rely on cavers to monitor and preserve caves to which they lack the skills to be able to visit, just as their colleagues do in Natural England. So, here too caving is clearly a 'responsible recreation' as defined by ARAG.

23. Cavers place a high value on conservation. Where caves have vulnerable and

fragile areas which are agreed by the caving community to lie off-limits, then cavers have laid coloured marker tapes on cave passage floors to indicate same. Otter Hole above – arguably the most beautifully-decorated cave in Britain – provides a good example of cavers’ conservation principles in action. The author of this paper visited the cave soon after its discovery, in 1980. He went there again recently, after a hiatus of more than 40 years. It was apparent that its formations remain in pristine condition. Section 26 of the CROW Act explicitly allows sites on CROW Access Land to have restrictions imposed for conservation reasons, as does s.193 of the LPA. Indeed, cavers already manage such restrictions under agreements between cavers and landowners, in the form of locked gates and leader systems, under which parties may only enter certain specific caves under the guidance of an approved leader. In Ogot Ffynnon Ddu, the unique formation known as The Columns, a group of slender, white calcite ‘poles’ that run from the cave roof to platforms of crystal that look as if they are floating in a pool, is only open to visitors for a few days each year. Ogot Draenen now has Geological Conservation Review (GCR) status because it contains geological and geomorphological features of national and international importance. Whilst GCR affords no specific legal protection, it is an important step on the road to gaining SSSI status which does. Overall, permitting access in principle need not be a concern because there are various mechanisms for control if necessary.

24. The ‘father of modern caving’, Edouard Alfred Martel, always stated it was both a recreational sport and a science. He coined the term ‘speleology’ to describe the science and founded the first journal devoted to it, *Spelunca*, in 1895. The interdependence between the sporting and scientific aspects of caving remains close: self-evidently, scientists cannot collect samples and make observations deep underground unless they are also adept cavers, while cave science involves many ‘sporting’ cavers in its more intellectual side. British cave scientists continue to make important contributions to knowledge of wide significance. For example, Dr Gina Moseley, currently at the University of Innsbruck, has won prestigious awards and accolades for her work on the changing climate in ancient



times and its relationship with atmospheric greenhouse gases. This work depends entirely on the collection of calcite samples from caves in Britain and elsewhere. Here too, caving – Dr Moseley is also a notable explorer of difficult systems – can be seen to be a ‘responsible recreation’ whose access arrangements deserve to be reconsidered.

#### *Cavers benefit the economy*

25. Caving already benefits the local economy of caving areas, but this beneficial impact is reduced as a consequence of access difficulties. The BCA estimates that in Wales, in a non-pandemic year, about 40,000 school students, youth groups and others will be introduced to the sport on guided trips. The instructors on such trips, whose qualifications are certified by the BCA, are of course employed as a result of the sport, and the parties who undertake them will also be spending money on accommodation and food, so benefitting local businesses. Yet, despite this high level of potential interest, the BCA membership list suggests that fewer than 700 of its individual and club members are active in Wales. We believe that this high rate of attrition is at least in part due to the difficulties and uncertainties currently presented by cave access arrangements. In 2017, the BCA conducted a survey suggesting that the total annual value of caving to the economy in the Yorkshire Dales was approximately £10 million. The lower numbers of cavers in Wales means that the value there will be lower, perhaps in the order of £3-4 million. Freer, easier access in Wales could increase this sum substantially, and this in areas which are otherwise economically depressed. The figures are better in Yorkshire as in practice more landowners are content for cavers to have access. But there should not be this variation.

#### *Excluding cavers from the CROW Act’s scope jeopardises all these benefits*

26. Uncertainty as to whether the CROW Act grants cavers the right to enter caves on CROW Access Land both restricts cavers’ access to important underground systems and creates ongoing uncertainty as to whether we will continue to enjoy that access where it does exist, dependent as it is on landowners’ whims, in future. Our desire to resolve this uncertainty and to widen access was the reason

we began the litigation settled by the consent order. This uncertainty affects both landowners and cavers in Wales and England, especially in the Brecon Beacons and Yorkshire Dales national parks. There are many important cave systems that lie wholly beneath CROW Access Land to which cavers have been denied access entirely. These include the caves that lie beneath high moorland owned by the Grosvenor Estate near Llangollen, where access is largely forbidden – yet hikers may hike on the hills and rock-climbers pursue their sport without restrictions on the area’s many limestone crags. Another example is Great Whernside in North Yorkshire, where walkers may roam freely on the surface above the huge but prohibited cave systems which lie beneath.

27. In some parts of Wales, access to important caves on CROW Access Land is currently allowed, but there is a risk that in future, this could be removed. The caves to which cavers could lose access in future include Chartist Cave, Pwll Dwn and Pant Mawr Pot. Indeed, Pant Mawr, an important system, is already subject to restrictions, albeit these are managed by the South Wales Caving Club. All these caves lie on CROW Access Land with no current restrictions to entry, but this could change at any time at the whim of the respective landowners.
  
28. Large parts of the Brecon Beacons National Park, for reasons of industrial heritage, are now classed as Urban Common rather than CROW Access Land. These areas are accessible for public recreation via a different legal access right from the CROW Act: under the Law of Property Act 1925 (LPA), with some of the largest caves in Wales located in LPA Urban Common areas. However, in its response to our claim for judicial review, NRW stated its view that the expression ‘for air and exercise’ as used in the LPA is equivalent to the term ‘open air recreation’ used in the CROW Act (enacted much later) and refers only to the land surface, not what lies beneath. There is therefore a risk that absent a review of caving access arrangements, and a reaffirmation of our right to enter caves on land governed by the LPA, cavers could lose access in future to systems where there are presently no restrictions in Wales.

## Conclusion

29. In summary:

- Caving promotes good physical and mental health.
- Cavers have a valuable part to play in scientific discovery and conservation.
- Cave rescue teams, being staffed entirely by experienced volunteer cavers, means that cave rescue incidents do not impose burdens on the emergency services because no police, ambulance or fire service personnel ever go underground or act in a surface control role. Our teams also respond at no charge to police requests to assist in surface incidents that may have an underground dimension, such as missing person searches in open countryside and recovering animals from crevices etc.
- Caving benefits the economies of caving areas, providing both specialist and non-specialist employment.
- Caving is a 'responsible recreation' as defined by ARAG in its final report.
- Caving should therefore be treated with the 'equity' recommended by the report for other such responsible activities.
- Like horse-riders and cyclists, which ARAG says should be granted CROW Access Land rights 'as a minimum', caving should too – bearing in mind that these other activities are specifically excluded from the scope of the CROW Act, while caving is not.
- The CROW Act does not need to be amended to permit the benefits of bringing caving within its scope to flow, but if the WM maintain that it does, that can be easily accomplished, indeed as anticipated for other activities set out in ARAG's recent report. The approach in Scotland (see s.1(6) of the Land Reform (Scotland) Act 2003) shows how the result is easily achieved.

30. In the circumstances it would be remarkable indeed if WM were to take the view on the one hand that rights under the CROW Act do not apply to cavers and on the other that it is not appropriate to amend legislation to enable this.

31. So we trust that WM will accept that change is necessary so that cavers should

be confirmed to have CROW Access Land rights in practice, particularly in light of the view that CROW Access Land rights should apply to recreation hitherto expressly excluded such as horse riders, paragliders and cyclists.

32. As for practical arrangements, the “how” of the order quoted above in paragraph 1, the key practical requirement is to recognise that cavers should be treated on a par with others engaging responsibly in outdoor activities, that this is the correct position in law, that caving has no conflict with other outdoor users and stakeholders. We anticipate that engagement, consultation and discussion with landowners would assist the smooth implementation of a change of approach. It may be desirable to consider issues such as insurance and occupier liability, and access to non-CROW Access Land to improve access generally (including on for example on urban commons). With good issue management, the circumstance should not arise, but WM may wish to consider how exercise of powers under s.34-39 of the CROW Act should be approached. If WM are of the view that details of practical arrangements require consideration with ARAG or a similar body, we do ask that cavers, through the BCA and Cambrian Caving Council, our regional body in Wales, should have at least one representative on it and others are invited to participate in a meaningful dialogue with it.
33. In any event it would of course be an unacceptable, indeed indefensible, resolution of the matter if WM were simply to opine that the CROW Act does not permit access and will not take the matter further. We trust that it will now do so urgently to remove barriers to caving as an outdoor activity which should have the same access rights as others.

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