This submission relates principally to question number six, ‘Do the arrangements and provisions for enabling and managing access to the countryside remain appropriate? How effective have Natural England – and other partners – been in promoting better access.’

1. Caving is an established outdoor activity very much enjoyed by those who participate. Early activists include the poet William Wordsworth, who found material for his famous poem, the Prelude, in the caves he visited in the Yorkshire Dales. Today, most exponents of caving enjoy the physical challenge, the adventure and wild environment, and the social camaraderie for which the sport is famous. Caving promotes physical fitness – indeed, it is impossible to conduct without maintaining a healthy physical condition - and psychological well-being.

2. There are two principal avenues to participation in caving, instructed and recreational. Instructed caving tends to focus on schools, outdoor centres and army cadets who are mostly under 18s. This avenue has an estimated participation level of around 150,000 individuals per year. Recreational caving involves more regular participation of individuals who would consider caving as ‘their sport’. These would be mostly over 18s and belong to university and regional caving clubs, as well as groups of friends with common interests. The British Caving Association (BCA) has 6000 members and estimates there are a further 6000 non-members who would consider themselves cavers.

3. The value of caving activities to the rural economy is thought to be in the order of £10 million per annum. This may not seem much compared to other activities, but it is focused on specific rural areas where it does make a difference. Caving is often more popular during the winter season, when outdoor visitor numbers are much reduced in those areas, so benefiting local businesses.

4. Caver numbers peaked in the 1980s and 1990s and have been in decline since the foot and mouth outbreak of 2001, when most caving areas were closed for an extended period.

5. Gaining access to caves is a major barrier to participation for many people. Across the country, and within the caving regions themselves, there is a huge difference in the type of access permitted to caves. For some caves, there is access for everybody, either free or with a ‘trespass’ or parking fee. For others, there are special access arrangements which restrict access to members of certain groups or clubs only. Typically, such caves require a permit which must be applied for in advance. For some caves, unfortunately, there is no official access at all. The type of access system applied does not generally reflect the difficulty or danger of the cave, but more often the attitude of the landowner to visitors, and their own liability concerns.
6. Some of Britain’s most sporting caves are restricted by ‘closed seasons’. Often these are not, as you would expect, due to land management reasons or conservation concerns, but due to the personal preference of the landowner or tenant. The same restrictions do not apply to other outdoor users who exercise rights over the same land. Certain caves have access restrictions that have little justification, where the suspicion is that it is the control of access that is enjoyed by those who administer it.

7. The Countryside and Rights of Way Act 2000 (CRoW) improved access to the outdoors for many activities such as climbing, gill scrambling, fell running and rambling on land designated under the act, principally mountain, moor, heath, down and registered common land. In some of our major caving areas, many caves are located on this land type. In the wider northern caving area centred on the Yorkshire Dales National Park there are some 2500 cave entrances, of which 1800 are on CRoW access land.

8. DEFRA/Natural England (NE) take the view that caving does not come under the Act. They state that a cave is not part of the land and caving is not an ‘open-air recreation’ as defined by the Act. However, the advice from Paul Johnson, the principal specialist in statutory access at Natural England, does confirm that any member of the public may walk to any cave entrance across ‘access land’ designated by the CRoW Act, and that they may descend into the entrance for an indeterminate distance. In Mr Johnson’s view, ‘a cave on a hill that faces out into the open air’ is covered by CRoW. But, he goes on, ‘the question in each case would then be how far inside a cave of this type, if it were deep, a member of the public would have to go before the rights ceased to apply because use no longer amounted to open-air recreation’. Mr Johnson has suggested that this distance could be to the limit of daylight penetration. This submission argues that position is onerous and discriminatory towards cavers, as opposed to other lovers of the outdoors. Furthermore, it is not a proper reading of the Act, and it does not reflect the will of Parliament in enacting it.

9. A legal opinion prepared for members of the British Caving Association by the eminent public lawyer, Dinah Rose QC, eloquently sets out the long background to the CRoW Act, and its emergence from the desire exhibited by governments over decades to open up our wild countryside for outdoor recreation. In Ms Rose’s view, to exclude caving from the scope of the Act simply because parts of caves have roofs is neither logical, nor in accordance with the wishes of Parliament when it passed the Act. She states:

‘The intention of the legislation is to permit access to the countryside, for the purposes of the recreations that may be carried out in such areas. “Open-air” in this context is best read in the sense of “outdoor” (ie., not within a building). Excluding caving from the definition on the ground that caves are underground tunnels would lead to arbitrary distinctions. Some caves include shafts which are open to the sky.

‘It is easy to see why Parliament was not intending to permit the public to access buildings. It is much harder to see why it should have been concerned to permit access only to locations with a view of the sky, or unconstrained air. Caving is an activity of the same kind as climbing, abseiling, scrambling, canyoning and walking, all of which are obviously intended
to be included within CROW. There does not appear to be any policy reason for excluding caving from the scope of the Act.

‘It is harder still to see why Parliament should have intended, as Natural England apparently believe, 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...

‘Put shortly, the interpretation of “open-air” in CROW as meaning “open to the sky” rather than “outdoor” is in my view too technical and narrow, and does not accord with the policy of the act, or lead to a rational outcome.”

‘I conclude, ...that the better view is that caving is a form of ‘open-air recreation’ for the purposes of CROW, and that cavers are permitted to enter and remain on access land as shown on relevant maps, including cave systems falling within those areas, for the purpose of recreational caving.’

10. The BCA and its officers have conducted an exhaustive search of Hansard, which has not turned up a single comment from anyone involved in the parliamentary debates suggesting that caving ought to be treated in a different manner to its sister sports. Indeed, speaking for the then-government in the House of Lords, Baroness Farrington successfully urged the withdrawal of an amendment which listed the activities that would be covered by the Act. She did so by arguing that such a list would be ‘undesirably restrictive and unnecessary,’ and would, wrongly, ‘exclude activities which can properly take place inside or outside... activities not necessarily carried out in the open air.’ In the then-government’s view, only activities which were specifically excluded from the CROW Act, such as hanggliding, would not be covered. The Rt Hon Chris Mullin, Parliamentary Under Secretary of State for the Environment, Transport and the Regions clearly stated in April 2000, ‘We are trying to allow everything that is not specifically excluded.’ There is no schedule that lists caving as such an excluded activity.

11. Despite a strong argument to confirm access for recreational caving under the CRoW Act, Defra and Natural England choose to adopt a negative view. They do admit that their view is not definitive, and that a court may decide differently. However, court action for individuals or small organisations is high risk, and in any case beyond the normal resources of the BCA.

12. NE’s approach to caving does not appear to be in line with its statutory responsibilities of ‘promoting access to the countryside and open spaces and encouraging open-air recreation’. Nor does it conform to Defra’s 8 point plan to ‘realise the immense potential for outdoor recreation in National Parks’.

13. The British Caving Association position is well supported by organisations such as the Sports and Recreation Alliance, British Mountaineering Council, Outdoor Industries
Association, British Canoeing, British Orienteering, etc. In addition a number of prominent individuals have made the following comments;

“The whole purpose of the Countryside and Rights of Way Act was and is to allow people the freedom to roam, to walk, climb and explore, and to experience the wonders of our natural world. That surely must include venturing right into caves as well as venturing across our mountains and moorland.”
Lord Chris Smith. April 2016 (Chairman of the Environment Agency 2008-2014)

“I cannot see for the life of me why DEFRA is taking the wholly illogical stance of denying that caves are covered by the open access freedoms granted by the CRoW Act.”
The Rt Hon David Davis, MP. December 2015

14.In our experience we do not find that Defra/NE take a position which promotes better access when given the opportunity. Furthermore we find some evidence that Defra/NE take the most restrictive view and interpret legislation in narrow ways unconducive to improving access to the outdoors. Natural England tell us that they commonly use the term ‘on foot’ in relation to the CRoW Act as can be seen in this Parliamentary written answer below

Caves: Written question - 31768
Q
Asked by James Heappey (Wells)
Asked on: 18 March 2016
Department for Environment, Food and Rural Affairs
Caves
Commons
31768
To ask the Secretary of State for Environment, Food and Rural Affairs, with reference to the Countryside and Rights of Way Act 2000, what her policy is on the extension of the definition of mapped open countryside to caves.

A
Answered by: George Eustice
Answered on: 29 March 2016
Section 2(1) of the Countryside and Rights of Way Act 2000 provides for a right of access on foot for the purposes of open-air recreation to land which has been mapped as open country (mountain, moor, heath and down) and registered common land.
The Government has no plans to extend the definition of mapped land under that Act to apply to caves.

Members of the committee may remember that amendments to include the term ‘on foot’ were specifically rejected in both the House of Lords and the House of Commons debates at the time. The government at the time considered a narrow definition would prevent visitors sitting to eat, bird watch or read a book, let alone prohibit the use of disabled person’s apparatus. Yet they have adopted the term for common usage.
15. In our dealings with Defra/NE we have found them to take a negative approach to cave access with no justified reason. Using narrow interpretations when this suits and illogical arguments, all to support their own view, does nothing to promote access. Our only conclusion is that they lack understanding of certain common outdoor activities and are consequently overly cautious in their approach to access. Rights of access to caves exist in Scotland without problem and we wonder when England and Wales will catch up.

End.

9 September 2017