

Section 4.6

SUMMARY

The proposed change arose out of a complaint that the CRoW Liaison Officer was acting beyond his remit (see Meeting April 2016 p3 & 5 - 7). It is understood that the intent of the motion to change the first sentence of sub section 4.6 was to allow the CRoW campaign to continue (see Meeting AGM June 2016 p20 - 23).

The proposal makes no difference to the underlying problem of whether the CRoW campaign remains one of campaigning to clarify the law or is campaigning to change the law which is not permitted by the constitution. Indeed it has revealed a fundamental problem with the constitution. If any proposed change to a cave is made by a landowner, then BCA will not be able to object because it would be not respecting their rights. In order to achieve a resolution on this fundamental point, I suggest that a new sub section be added to the constitution to that:

13.5 Notwithstanding any limitation (perceived or otherwise) contained within the constitution related to a current piece of legislation, that limitation does not preclude the Association from campaigning to change that piece of legislation, subject to having obtained agreement from the National Council.

This will not only deal with the concerns of the proposers of changing the first sentence in sub section 4.6 but also stop any future arguments along similar lines.

I concede the motion has caused me to recognise the existing sentence can be improved. If there is a desire to change the sentence, then I suggest:

4.6 That the legal right to control access to and within the cave held by a holder of that right shall be respected.

I within this document formally propose these motions be placed on the agenda for the AGM.

ARGUMENT

The proposal is to amend the first sentence in sub section 4.6 from:

“That the owners and tenants of property containing caves have the right to grant or withhold access.”

to:

“That any rights held by the owners or tenants of property or mineral rights, to grant or withhold access, be respected.”

(NB Yellow highlighted words are omitted and grey highlighted words are additions.)

The rest of the sub section goes onto say:

“Where caving bodies have control of access delegated to them by the owners, such access should be obtained and granted as freely as possible for all responsible cavers, within the terms of those

agreements. When obliged to make new agreements, the appropriate body should endeavour to ensure that this freedom is maintained or improved.”

I consider the proposal has no impact on the rest of the sub section and thus will not further consider the rest of the sub section.

There are four changes, namely:

- a) Inclusion of ‘mineral rights’;
- b) Omit ‘containing caves’;
- c) Change ‘have the right’ to ‘any rights held by’ and switch its location; and
- d) Include ‘be respected’.

I will deal with each separately and pick up three additional thoughts.

A Inclusion of ‘mineral rights’

The existing sentence in sub section 4.6 refers to owners and includes one other potential rights holder, namely tenants. The proposal adds another potential rights holder, namely ‘mineral rights’. However there are potentially a vast number of other rights holders of interest, for example shooting rights. Mineral rights holders will, if they have exercised their right, have almost certainly shared that right with the Mine Operator. So the proposed inclusion highlights the omissions of many other potential names from the list. I suggest rather than try to expand the sub section to cover all potential rights holders, it would be neater to reduce it by just referring to holders of the right to control access.

Also the ‘right’ of specific interest within the sentence is ‘to grant or withhold access’. In detail, the right is taken as not just access within the cave below the surface but also across the surface of the land to the entrance. (Which is where usually the conflict of interest arises which leads some land owners and other rights holders to refuse access.) There is a potential ambiguity as to whether the ‘right’ focuses on one or both aspects and acknowledging that rights holders may not have a ‘right’ covering both aspects.

B Omit ‘containing caves’

I understand the proposal was extracted from the constitution of the Cambrian Caving Council which has considerable interest in mines. Thus possibly to just refer to caves would be upsetting to some of their members. I consider however that without specifying what the access is in relation to, then someone might raise an argument that the person with a right to say graze cattle on a common is thus recognised by the sub section as having the power to deny access to the cave. Whilst it might be upsetting, cave is clearly defined in BCA’s constitution at sub section 2.2 as also covering mines and other underground cavity. So it is sensible to confine the application of the right to access to or within a cave, mine or other underground cavity and appropriate to paraphrase this by just referring to cave.

C Change ‘have the right’ to ‘any rights held by’ and switch its location

The inclusion of ‘any’ could create a question over whether ‘any rights’ refer to say for example ‘the right to pick flowers’. So does a person with a right to pick flowers have the right to grant or withhold access (I omit ‘to or within a cave...’) as well?

I accept the shift in text to locate the term 'right' away from which right one is talking about still leaves it recognisably linked to granting or withholding access.

The change expands 'right' to 'any rights' in another context. There are several 'types' of right which can also be categorised as those derived from the law (be it common law or statute law or by decision in court), those derived by contract together with those derived by tacit agreement. To clarify the later, I am referring to an implemented right such as the individual calls and seeks agreement from the land owner to descend the cave even though there is no law or contractual based reason to do so. (It is done from politeness or some other reason.) One of the problems with the existing sub section is it does not clarify what 'type' of right it was referring to. I suggest the sub section is not intended to cover those rights derived from tacit or other non legally or contractually based agreements.

A legal right derived under contract means both parties have agreed to it. Those rights derived by law (be it common or statute or by decision in court) can be summarised as being applied in two ways either to give or deny the right of access. A simple example is access to a public highway as opposed to a private road. Clearly in the case of say a land owner of a public footpath, the land owner has no right to deny access so the sub section does not apply. But in the case of a private road the landowner does have that right.

But this does not get to the heart of the debate over 'does CRoW apply to caving'. Currently DEFRA and NRW consider it does not but concede it is a matter for the courts to decide. A powerful case has been made that it does. I note that the ballot result showed a clear majority of the membership were in favour of pursuing the argument that CRoW does apply to caving. In such a situation is this sufficient to describe 'CRoW applies to caving' as a legal right and thus the sub section does not apply to land which CRoW applies? I believe this is at the heart of the current difference between those who support and those who object to the campaign to get CRoW recognised as applying to caving. (There is of course a more fundamental objection based on conservation arguments and no doubt other facets which I do not wish to get into in this document.) This aspect of clarifying a legal right was discussed at Council in March 2015 (p2 & 3) and agreed by motion at the 2015 AGM (p18) stating:

This meeting confirms that the Constitution allows BCA to seek clarification from DEFRA and Natural England on their existing guidance on The CRoW Act and its application to caving.

Council subsequently debated a complaint from CSCC in April 2016 (p3 & 5 – 7) that work had gone beyond this remit, concluding that "Council acknowledges the complaint from CSSC but in Council's view the motion agreed at the 2015 AGM was not a limiting motion and Council and its Officers have, therefore, acted properly".

I consider that adopting the proposal will not change the debate one iota and be a futile waste of time.

D Include 'be respected'

I consider the inclusion of 'be respected' adds little other than to reinforce the stated fact of the land owner having a right. It was claimed at the AGM that "*The original version gives landowners a right, the amended version respects any rights they hold*". To respect the right does not vary the underlying problem of whether the existence of the right can be campaigned against.

E Revised Sub Section

If the meeting feels a need to revise the first sentence in sub section 4.6, then I suggest the following will take on board the above observations:

4.6 That the legal right to control access to and within the cave held by a holder of that right shall be respected.

F Changing the law

In debating the ballot result, the point was made and conceded that the existing sentence in sub section 4.6 respected the existing state of the law and thus the ballot could not be used as a justification to change the law. It was conceded that the 'CRoW applies to caving' campaign was to clarify the interpretation of the law. This raises a fundamental question of whether BCA should be stopped from undertaking a campaign to change a law because of a pre existing statement in its constitution. Whilst it can be argued that in such circumstances, BCA can change its constitution, the time required to do so may well impede an agreed worthy campaign.

Further more if a land owner decided for example to apply for permission to quarry away the cave, then because they have a legal right then it could be construed that the sentence stops BCA from campaigning against an application to do so. Looking to the future, it is widely feared that there will be changes to statutes covering conservation post BrExit weakening them. Clearly many land owners will be in favour of reduced controls on themselves. So the sentence could be taken as an obstruction to us from campaigning against such changes.

An alternative approach would be to permit such actions subject to agreement by Council. I therefore suggest a new sub section be added to the constitution at Section 13 as follows:

13.5 Notwithstanding any limitation (perceived or otherwise) contained within the constitution related to a current piece of legislation, that limitation does not preclude the Association from campaigning to change that piece of legislation, subject to having obtained agreement from the National Council.

This will not only deal with the concerns of the proposers of changing the sentence in sub section 4.6 but also stop any future arguments on similar lines.

G Alternative Approach

One of the claims made by the anti CRoW applies to caving camp is that the ballot promised a constitutional change. The words used in the document explaining the ballot were "BCA will ... seek to change Section 4.6...". That was not an absolute promise to change the sentence. As has already been noted, the topic has been covered by both Council and an AGM.

The whole problem could be side stepped by simply getting the AGM to declare that seeking clarification may encompass activities which may well seem to be campaigning for a change in the law and confirm the judgement made by Council on the actions of the CRoW Liaison Office.

Alternatively, the sentence could be removed from the constitution. Whilst this is the second most simplest solution, it does have the negative aspect of BCA seeming to become land owner hostile.

H Conflict of Interest

It occurs to me that some may contend I have a conflict of interest as being BCA's Legal & Insurance Officer. I therefore write this as an individual and not in my official capacity. I shall also be circulating this document to others.

Bob Mehew
19 February 2017
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Annex - Links into Council meeting minutes on CRoW

Oct 2014 – agrees to ballot p5 - 7
Jan 2015 – way forward p7
Mar 2015 – agree no need constitutional change p2 & 3
June 2015 AGM – motion confirming no need – p18
Oct 2015 – p6 - 9
Jan 2016 – p6 - 10
April 2016 – p3, 5 – 7 CSCC complaint & outline of motion
June 2016 AGM – motion sent to Council p20- 23
Oct 2016 – p15 & 16

Formal Proposals

To The Secretary, BCA

Please place the following on the agenda for the BCA AGM on 11 June 2017

1 A new sub section be added to the constitution at Section 13 as follows:

13.5 Notwithstanding any limitation (perceived or otherwise) contained within the constitution related to a current piece of legislation, that limitation does not preclude the Association from campaigning to change that piece of legislation, subject to having obtained agreement from the National Council.

2 That the first sentence in sub section 4.6 of the constitution be deleted and replaced by:

4.6 That the legal right to control access to and within the cave held by a holder of that right shall be respected.

Bob Mehew
28 January 2017