SECOND SUBMISSION BY AVICH AND KILCHRENEAN COMMUNITY COUNCIL, ARGYLL, SCOTLAND, UNITED KINGDOM.

Following a telephone conference to discuss decision V9/n of the Aarhus Compliance Committee.

The telephone conference was not successful for technological reasons. We regret that it has not been possible to convene a fuller discussion of issues concerning a wide range of Communicants.

Under reference to

- decision ACCC/C/2012/68 and
- decision V9/n, and
- AKCC's earlier submission of 1 March 2017,

the Avich and Kilchrenan Community Council (an elected body representing local interests) makes the following further respectful submission to the Compliance Committee.

Risks recognised are that this submission may include issues or evidence which may be considered on the borders of, or in part outwith relevance. The choice and challenge has been therefore, whether to take those risks and allow the Committee to decide for themselves which they may be, or to remain silent. In the interests of the need for full disclosure of findings, the former choice has been considered justified.

It is appreciated that it is not the Committee's job to 'police' or micro-manage the workings of the Scottish Government at any level, unless the provisions of the Aarhus treaty are visibly contravened. The difficulty for a Community Council at the grass roots of the democratic process, is to decide whether issues raised come within the three Pillars of:

- Public access to information about developments,
- Public participation in decision making, and
- Public access to justice which is not disproportionately expensive,

and whether these three Pillars are separately, or together, being successfully implemented in Scotland.

The Scottish Government (SG) clearly has a right to have renewable energy policies. These policies may not be universally or enthusiastically endorsed, particularly by those communities which have to host renewables projects. Beyond the endorsement of "sustainable energy" policies, there is no sign that Scotland, within the UK, is developing a National Renewable Energy Plan or Strategy akin to that required by the EU Renewable Energy Directive. NPF 3 (2013) and SPP 2 (June 2014) endorse sustainable development and "carbon free" development. The positioning of renewable developments is left to the Planning process.

The right to have <u>access to information</u> about a project, and its ramifications, is likely to be constrained at a local level if renewable development is imposed and enforced by way of

centrally enforced policy or legislative changes which cut across or impede access by members of the public to participation in decision making.

In Scotland, development is guided by Local Development Plans, which are published in draft, examined by Reporters who should take account of local submissions, and then adopted to guide decision making. The public has access to the information which contributes to the Local Development Plan.

Public participation. If the statutory requirement of Local Planning Authorities (LPA) to determine their own Local Development Plans (LDP) is constrained by the imposition of unsuitable criteria for windfarm development at any cost, a breach of the public's right to take part in decision making is likely to occur. There are examples where the weight of Government Policy has forcibly overwhelmed the weight of local opinion, as expressed in such draft Local Plans. Such enforced changes from a working draft which has been the subject of public participation **may not**, in turn be re-subjected to public consultation before being forcibly adopted at the behest of central government.

However, the Scottish Government now requires the publication of Supplementary Planning Guidance (SPG)[(1)] by local authorities, and that SPG should be subject to full public participation before being adopted. There is some evidence that this is not being done in every case, as in the example below which is also attached.

North Ayrshire Council. A response received from North Ayrshire Council to a Freedom of Information request admitted that:

"The Council has not published Supplementary Guidance in relation to its Local Development Plan. As such, there are no relevant 'publication participation consultations' in this regard. The Council has some planning guidance notes, that are available on the Council's website. These are do not constitute formal Supplementary Guidance. The Council's planning guidance has not been the subject of public consultation."

Responses to Freedom of information requests sent to councils on this subject are still being received and examined so will not be available by the April 1st deadline. However, where applicable they will be forwarded.

Re. strategies or frameworks on specific issues - for example, where guidance on the location of large wind farms is involved,[(1)] public participation should remain an absolute requirement. In addition, as this guidance must accord with national planning policy underlining that the ***role*** of local government was to meet renewable energy targets for 30% overall demand being met by renewables by 2020, we and the Committee may be entitled to question whether Scottish Government Reporters' instructions to the local government officials employed to administer and serve their regions through democratically run systems, should ever result in a prevention from:

1. Engaging the public fully via consultations on government changes to local plans.
2. Rejecting changes if they are found to be against the public's wishes or interests of their regions.

It follows that where LDPs and SPG have either not been the subject of full consultation, or where councils have been subjected to pressures to conform, it becomes unavoidable that public participation will be restricted.

A related issue may be **responsibility for enforcement.** If DPEA/Scottish Ministers have awarded consent (s36 or otherwise) or upheld an appeal to discharge a condition, it appears therefore that it would be the Scottish Government that should be enforcing that condition, not the Council/Local Authority. This would have serious implications for all manner of planning applications, for example, it would remove any vestige of protection of Private Water Supplies(PWS) or provision of alternative water supplies.

It was made clear at the Sneddons Law Hearing in Scotland this year and in written statements, that once the PWS condition was discharged, that neither the Local Authority, nor the Scottish Environment Protection Agency (SEPA), would have any responsibility for the provision of alternative PWS and that this would be left to individual PWS owners to negotiate with the developer, incurring what will often be unmanageable costs for most wind farm near neighbours. Taking cases on to a Judicial Review(JR) is not an option for councils due to costs as they are all experiencing serious economic problems. This is also affecting their decisions on whether they can *afford* to defend Appeals, however justified.

Re. the relevance of section 36 variations. Please see attached publicly available report (emphasis added) which might raise issues of relevance for the Committee to consider.

In respect of Article 7:

Providing necessary information:

174. States clearly the requirements. In the case of © examples of the Scottish Government's analyses through which information on possible effects of proposed plans or programmes have not been found. This impacts upon 175. which lists why this is necessary 'so that the basis for the final decision can be justified on the basis of a valid comparison between the different options'.

Re. Taking due account of comments. (emphasis added).

181. A useful way to demonstrate that due account was taken of the results of the public participation is by providing a statement attached to each draft summarising the points in the draft where the results of the public participation have had an impact, and outlining what that impact had been. ***Such a statement might be attached to the drafts submitted at each stage of the procedure to prepare a plan, programme or policy. In systems which use regulatory impact assessment the statement might form part of the impact assessment report.***

183. As a good practice, after a plan, programme or policy has been adopted, it may be helpful to review how successful the public participation procedure was, for example, by consulting the public or commissioning a study to examine the following issues:

a. Did all the public affected find out that the plan, programme or policy was being prepared?

b. Were they able to participate?

c. Do they feel that their comments were taken into account?

d. Do they understand the decision maker's reasons for adopting the plan, programme or policy adopted?

It is believed that some of the above requirements are not being met as although the consultations held have been acknowledged and listed, experience shows that feedback to the public on their submissions to consultations may be non-existent. Examples where public consultations submissions from ordinary citizens have **ever** had a response other than an acknowledgement of receipt have yet to be found. Neither have they been provided with a statement attached to the draft summarizing the points in the draft where the results of participations have had an impact. Likewise, precious few professional submissions are in receipt of any dialogue, except for those from Government organisations. This can be demonstrated in respect of important Energy consultations from both as follows:

1. April 2015 Response to the Scottish Government Call for Evidence on Security of Supply for the electricity system:

   IESIS (The Institution of Engineers and Shipbuilders in Scotland) submitted two responses to this from Donald Miller and Colin Gibson respectively. They covered technical details and the principles of how security of supply should be the responsibility of an Energy Commission. Both reports were published but without the two experts, by far the most competent people to respond, being called to give evidence to the Committee.

   As very few people are educated about how to solve problems in situations of complex uncertainty, the input and advice from experts who do respond to consultations should be shown to have been both understood by government and, where points are shown to be valid**, acted upon with full disclosure to the public as required under the Convention.** If the reverse is true, and advice rejected, that too should be publicly disclosed **with reasons** given.

2. This is the link for Mr. Stuart Young's publications which have been submitted to the SG and DECC etc.:
   http://www.windsofjustice.org.uk/2014/08/analysis-of-uk-wind-power-generation-report-by-stuart-young-commissioned-by-the-john-muir-trust/

3. Attached is another past Aarhus consultation submission made on behalf of AKCC.

It may be that the huge number of consultations becoming largely 'box ticking exercises' rather than that intended under Articles of the Convention, is relevant for consideration. Only acknowledgements are sent and there is no evidence that submissions from whatever professional or public quarter, influence government policy – particularly that of energy.

Another area of concern relevant to Article 7 is that each council produces its own version of wind farm maps and records for wind power developments and they are mostly extremely complex to access. There are *no* consistent maps overall. Scottish Natural Heritage, who were charged with producing wind farm development maps for Scotland as a whole, ***have not updated this since 2013*** since the organisation now only becomes involved with proposals affecting sites of National importance. It is claimed that this renders their records too incomplete to accurately construct maps. **So there is no single central source of information for wind power developments.** This has resulted in the Scottish Government admission that it has no idea of how many wind turbines there are in the country or of turbine numbers involved at

any one time. Therefore the ***overall and cumulative environmental effects*** on people and their habitation cannot be accurately assessed without laboriously accessing information from all council areas – which produces ***a further weakening of accurate public participation exercises.*** This situation has largely occurred due to the speed of construction of developments and the rising number of overruled application refusals via the Appeal system. It may be relevant to mention the lack of logic attached to the building of wind farms with no grid connections and consent of grid connections with no generation – plus transmission lines consented with no regard to either issue.

We can also find no recognition by Government of the Aarhus article requirement that developers must have demonstrated that they have considered alternatives for proposals applied for.

Access to justice

Overall, it is believed that concerns raised by ourselves and others show that access to justice requirements are not yet fully met and that some measures in place contravene the spirit, intentions and articles of the Aarhus Convention.

Rule of Court 58A of the Rules of the Court of Session does not expressly provide for the entitlement of community bodies to bring Court proceedings, or to participate in them. We think that it is implied, and cases such as *John Muir Trust* and *RSPB*, previously cited, seem to endorse that proposition. Consideration should be given as to whether the Rule should fully and expressly embrace the right of community bodies or NGOs, showing a relevant interest, to take action or to intervene in litigation.

In addition, the Scottish Civil Justice Council has published for consultation a discussion paper on further amendment to Rule 58A. The discussion paper may be found at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-draft-rules-for-protective-expenses-orders/consultation-document.pdf?sfvrsn=8

While AKCC will be making its own submission on this consultation in due course, it is believed that it is helpful to the Committee to have notice of this consultation, which appears to be a further attempt to align the text of the Rules with the provisions of the Convention. We do not consider that it would be helpful or appropriate to answer the questions in the consultation in this submission.

In relation to Protective Expenses Orders (PEOs), it would be helpful if there were to be published guidance on PEOs in much more user friendly language as both community/parish councils and the public often struggle with the terminology used in current information available.

Conclusion.

The planning system in Scotland is now at a complexity often well beyond the understanding of people who need to have serious problems recognised and addressed. Changes being imposed are making this less likely and a sense of helplessness is pervading both the affected public and planning officials trying to do their job - alike. Many have lost confidence that Government is

listening or even cares about problems arising in what amounts to 'wilful blindness' over political expediency adversely affecting policy. This has driven the need to inform via issues raised. We hope that they will prove relevant to the Committee's requirement for information impacting upon the UK's compliance with those aspects of the Aarhus Convention under consideration.

The AKCC is grateful for the opportunity to respond further and would welcome the decision of the Compliance Committee on the matters now raised before it.

Mrs. V.C.K. Christine Metcalfe. AKCC. 31 March 2017

(1) Supplementary Guidance. http://www.gov.scot/Topics/Built-Environment/planning/Development-Planning/Supplementary-Guidance states:

Common types of supplementary guidance include:

Strategies or frameworks on specific issues – for example, guidance on the location of large wind farms.