



EQUALITY IMPACT ASSESSMENT:

PROPOSED COURT RULES FOR ATTENDANCE AT HEARINGS

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Step 1 – POLICY BACKGROUND

What is the purpose of this policy?

An ongoing expansion in the use of electronic hearings is considered a proportionate means of modernising the civil courts and the availability of that option can help deliver more accessible services for some court users (i.e. those who are able to participate effectively with a digital service).

The policy objectives for these proposed new rules are:

- To help inform decisions on which mode of hearing (attendance by electronic means (either video or telephone), in-person or hybrid) is likely to be the most appropriate within given categories of civil proceedings;
- To promote consistency in procedure between courts where practicable; and
- To provide greater predictability in the likely outcomes for court users.

For the purposes of this paper:

- An electronic hearing is one where all participants would attend remotely by electronic means (either by video or by telephone).
- An in-person hearing is one where all participants would physically attend a courtroom or hearing room.
- A hybrid hearing is a mixture of the two.

Why is it being developed or revised now?

The availability and use of electronic hearings within the justice system has gradually expanded over recent years and their use has rapidly accelerated as part of the COVID 19 response. In terms of the user experience, the electronic mode of attendance has been seen as beneficial by some and problematic by others.

This in turn has led to an ongoing public debate on the policy arguments for and against electronic hearings both within Scotland and internationally across all legal jurisdictions. Awareness of this policy debate falls firmly within the Councils' statutory function of keeping the civil justice system under review.

This debate highlights the pragmatic need for the parties and the courts to be seen as striking the right balance when deciding on the mode of attendance for a hearing. This is a matter which the Council believes it can usefully clarify through the drafting of proposed new rules.

The Council welcomes feedback on these rules from all sides of the public debate including the general public, party litigants, represented parties, practitioners, the judiciary, third sector bodies and civil society in general. Subsequent revision of the proposed rules based on that feedback will allow the Council to recommend a finalised set of rules to the Court of Session for its consideration.

The reason for taking action now is:

- To better inform court users of the range of factors that are considered relevant when deciding on the most appropriate mode of appearance for a civil court hearing;
- To ensure that there is a consistency of approach across the courts that helps to provide court users with predictability in terms of the most likely mode of appearance for their case: and
- To ensure that a new court procedure has been refined and agreed in advance of the emergency Coronavirus legislation being repealed.

How will staff and/or customers be affected by this policy?

Court Users

The content of these new rules will provide the parties to civil proceedings, practitioners and the media with greater visibility of:

- Some of the factors that are taken into account when deciding on an appropriate mode of appearance; and

- The necessary safeguards that allow the parties and/or the courts to respond to individual circumstances and enable effective participation in hearings.

Having this additional information in the public domain will help improve the general level of understanding around how these decisions are taken across the civil courts.

Court Staff

The proposed new rules will help to clarify the guidance available and enable court staff to convey that information to others. Otherwise, the proposed rules are expected to have minimal impact on operational court staff. There are existing processes in place that enable staff to support each mode of attendance (electronic means (video or telephone), in-person or hybrid) and staff do have significant operational experience with each hearing type.

It is anticipated that the most noticeable impact for staff will be volume shifts between hearing types as the judiciary, practitioners and parties adjust to the guidance provided within these new rules.

Judicial Office Holders

The new rules will support transparency and consistency in judicial decision making. Once they have been commenced, ongoing judicial feedback on the rules in use will support the Council monitoring the suitability of these rules and responding to any suggested improvements (e.g. through improved training and guidance, or updates to rules).

Council Members

Once the rules have been commenced then any management information indicating a disproportionate number of motions being lodged under a listed category of business would be indicative of the need for the Council to review the rules for that category.

What research has influenced the development of this policy?

Judicial Decision Making

Equal Treatment Bench Book – The [equal treatment bench book](#) sets out in some detail the way in which the judiciary in Scotland currently respond to the needs of all those with protected characteristics.

Judicial Discretion - There is an overarching duty on the court to protect the right to a fair hearing and to ensure that cases do proceed in the interest of justice. To do

that, the court regularly makes directions which take into account the specific circumstances affecting the parties to civil proceedings; including decisions on the appropriate mode of appearance (an in-person hearing, attendance by electronic means (either video or telephone) or a hybrid of these modes) so that all parties can participate effectively during such hearings.

Business Levels

Backlogs – The Covid 19 pandemic has impacted negatively on the operations of the courts with significant delays arising, particularly in the backlog of criminal trials. Over the next three to four years, additional courts are being resourced to help reduce those backlogs and prioritising the use of physical courtrooms for criminal business can assist with that recovery. In a practical sense, those suitable civil cases that are diverted to an electronic hearings mode will help support overall reduction in system backlogs.

Technology

Digital Strategy – Over the last decade or so, a number of court jurisdictions have been progressively introducing the use of electronic hearings as an additional option for both criminal and civil business. That provides a substantial literature base on the advantages and disadvantages of adopting an electronic model, along with the key lessons learned on that journey. That background underpins the [SCTS Digital Strategy 2018-2023](#) which sets out a clear direction of travel for the SCTS based on the gradual adoption of digital technologies within the courts, with a particular emphasis on reducing the need for any unnecessary personal appearances in courtrooms.

In March 2021, the Scottish Government refreshed its own digital strategy and published [A changing nation: how Scotland will thrive in a digital world](#). In terms of responding to equality impacts, that strategy reinforces that when moving services online there is a need to ensure that everyone can access services, that inequalities are reduced and that the least advantaged in society are not excluded from the services they may need the most.

Digital Standards – In February 2021, the Scottish Government launched the [Digital Scotland Service Standard](#) as a replacement for the previous Digital First Service Standard. When it is designing and delivering its digital services the SCTS continues to work towards meeting those standards. Standard number 5 (make sure everyone can use the service) is of particular relevance in terms of responding to equality impacts.

Video Platform - A key element of the [SCTS Digital Strategy 2018-2023](#) was enabled by the rollout of the WebEx platform to support video hearings during 2020. Its subsequent level of use rapidly accelerated as part of the response to the Covid pandemic. That video platform is subject to continuous improvement by the SCTS with a current focus on the development of breakout rooms to improve the way in which parties can consult their legal representatives in confidence during a live hearing.

Telephone Platform – The SCTS uses the BT MeetMe service to support those electronic hearings that take place via telephone. BT MeetMe is an instant audio conferencing service that requires access from a fixed or mobile phone to enable virtual meetings with up to 40 participants. SCTS also use Cisco Conference call for some hearings in the sheriff courts. A number of participants in electronic hearings have already indicated a preference for video hearings over telephone hearings, particularly for Child Welfare Hearings. It is understood that Sheriffs Principal are looking at issuing revised guidance and this is expected to support a shift towards the increased use of video hearings. If however, the Council's proposed policy is implemented, the court rules will provide for most hearings in family cases (including Child Welfare Hearings) to be conducted in-person.

Equalities

Inclusive Justice: A System Designed For All – In June 2020, the Equality and Human Rights Commission published the outcome of their [review](#) into the way in which those with disabilities are currently being treated by the justice system in England and Wales, and in Scotland, with a particular emphasis on the way in which technology is being rolled out and its potential impacts on the disabled accused.

User Experience

Civil Justice Conference, May 2021 – on 10 May 2021, the Judicial Institute of Scotland hosted a video conference for the judiciary and practitioners to share their experiences of handling civil business remotely during the response to the Covid pandemic. The conference outcome report, along with the various papers circulated by speakers in advance of the conference, is available [online](#). The conference captured a wide range of views on people's experience of remote hearings, along with both the perceived advantages and disadvantages.

How does this policy impact upon the public sector equality duty?

The SCJC does not provide front line public services but it is providing “functions of a public nature” when it is proposing draft court rules for consideration by the

Court of Session. It must therefore have due regard to the general equality duties under the Equalities Act 2010:

Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.

To ensure they will be neutral in their effect on those with disabilities and those without, the proposed new rules have been drafted so that:

- They list the categories of business where an in-person attendance at a hearing is likely to be the most appropriate response for a case, and include the safeguards of applying for or directing the alternate (an electronic hearing (video or telephone) or a hybrid hearing)
- They list the categories of business where electronic attendance (by video or telephone) at a hearing is likely to be the most appropriate response for a case, and include the safeguards of applying for or directing the alternate (an in-person hearing or a hybrid hearing)

A number of those with impairments prefer not to disclose the nature of their impairment unnecessarily. The drafting approach taken of listing general categories of business as the default option, is consistent with that preference.

It is only when exercising a safeguard that there is a need to disclose that an impairment might affect a person's ability to participate effectively. The associated forms include appropriate prompts to parties on the grounds for lodging such a motion, with the benefit being that the court can direct the mode of attendance that will best facilitate effective participation.

Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

The proposed rules provide a general steer on a default mode of attendance the court considers "most likely" to be appropriate for the categories of case listed. For those with impairments, the factors unique to their circumstances can be disclosed to the court which will allow the mode of attendance to be changed to that which best facilitates effective participation.

That will increase equality of opportunity for some people with protected characteristics:

- Electronic attendance at hearings can benefit those with mobility or stamina related disabilities who may otherwise have been unable to travel to court to attend in-person.

- In-person hearings can benefit those with a learning disability who can participate effectively through face-to-face contact but may struggle with attendance by electronic means in a video or telephone situation.

Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The rules provide an additional source of information within the public domain on the factors that underpin decision-making with regard to the default position for the most appropriate mode of attendance, and the safeguards in place to apply for or direct an alternate mode.

The availability of that information should assist both those with disabilities and those without in their understanding of the way in which the justice system works and how the courts will approach the task of issuing directions on the type of hearing that is appropriate.

How has feedback from equality groups helped to this shape the policy?

Feedback from a wide range of Equalities Groups across multiple jurisdictions is already in the public domain as part of the extensive public debate on the advantages and disadvantages of electronic court appearances. That feedback, along with the previous engagement work undertaken by the SCTS with equalities groups, has been distilled into the information provided within this EQIA.

Equalities groups are on the list of consultees for the Consultation and they will respond publicly on the proposed rules should they chose to do so. Whilst this Consultation is running, the SCJC secretariat will meet with equalities groups directly to discuss and expand on the evidence provided within this paper.

This EQIA will be refreshed and reissued following completion of the consultation exercise and finalisation of the new rules.

Step 2 – ASSESSMENT OF LIKELY EQUALITY IMPACTS

When considering likely equality impacts there is a need to be aware of the differing roles of the organisations supporting the judiciary:

- The “rule making” function sits with the Scottish Civil Justice Council (SCJC) and it is responsible for making reasonable adjustments within any proposed rules to anticipate the needs of those with impairments.
- The “service delivery” function sits with the Scottish Courts and Tribunal Service (SCTS) in terms of the frontline digital services (*websites, video platform, telephone platform, helpdesks etc.*) that support the rules in use. The SCTS has lead responsibility for making reasonable adjustments within those digital services.

This EIA is narrated from the Councils’ perspective with a focus on our rule making function. For completeness we also signpost work the SCTS undertakes to continually improve their delivery of the frontline digital services that support these rules.

**ALL
COURT
USERS**

DIGITAL EXCLUSION

DATA - The Office of National Statistics (ONS) provides a statistical bulletin on [UK Internet Users](#) which indicates that 92% of adults were recent internet users in 2020 (up from 91% in 2019). The same bulletin indicates that 6.3% of adults in the UK have never used the internet (down from 7.5% in 2019)

That 6.3% of the adult population represents a significant volume of individuals who remain digitally excluded and some of their underlying reasons for not using the internet would include:

- *Digital Skills* – individuals may lack digital skills or not have the confidence to engage with and use a digital service or simply choose not to use the internet
- *Digital Devices* – some individuals cannot afford to buy their own equipment, or are unable to gain access to such equipment through friends or local support providers
- *Connectivity* – some individuals may have both the equipment and skills but still cannot get online effectively

e.g. they cannot afford a broadband connection, or their connection speed is too poor to support video or they live in a remote rural area that has yet to receive high quality broadband coverage.

Some of the steps being actively taken to mitigate the effects of digital exclusion on the population of Scotland include:

- *Support Providers* – a number of third sector providers such as Citizens Advice and Age Scotland provide access to devices and connectivity for their particular client groups, along with digitally confident staff who can support those who lack digital skills or confidence
- *Improving Access to Devices and Skills* – the Scottish Government’s “Connecting Scotland” project responded to the pandemic by providing an internet connection, training and support and a laptop or tablet, so that most vulnerable and digitally excluded people in Scotland can access services online. It aims to bring 55,000 people online by the end of 2021.
- *Improving Connectivity* - the £463m invested in Digital Scotland’s “Superfast Broadband Programme” has resulted in 950,000 homes and businesses having access to extended fibre broadband, and that includes 75% in Shetland and 79% in the Western Isles. That said 20% of Scotland are yet to get full 4G coverage and this programme continues to address that gap.

In order to maintain the interests of justice, an overarching aim for the courts is for all parties to be able to participate effectively in their proceedings. The extent to which parties cannot access suitable IT equipment, or the skills to use it, is a known barrier to the use of electronic hearings:

Reasonable adjustments in court rules:

- *Effective Participation* - the proposed rules reinforce that the factors that underpin digital exclusion will be taken into account by the judiciary when issuing directions on the mode of attendance at court hearings.

- *Forms* - the associated forms include appropriate prompts for using digital exclusion as grounds for lodging a motion.

Reasonable adjustments in digital services

- *Accessibility* – the digital services provided by the SCTS need to be compliant with the [Digital Scotland Service Standard](#) including: accessibility standards for websites, support for assistive devices etc.
- *Information and Guidance* – the SCTS provides a range of information to assist court users including [online](#) guidance for electronic attendance at hearings. To support video hearings that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, links to online support from WebEx for troubleshooting, and details for joining hearings by telephone as a backup if required.
- *Assisted Digital Support* – the SCTS continues to develop its strategy for assisted digital services so that those who have difficulty engaging with electronic hearings due to digital exclusion can be better supported to do so.

LEGAL TERMINOLOGY

The legal profession uses complicated legal terminology that can make the procedures in the civil courts difficult to understand for both party litigants and those who are represented. That becomes far more problematic for those with more complex communication needs.

Electronic Hearings – negative impacts

- *Video Hearings* – For those with communication difficulties the use of video hearings can create a sense of separation from the other people involved in the hearing, which will be heightened if the complex legal language and processes hinders their understanding and ability to participate

Reasonable adjustments in court rules:

- *Information & guidance* – the statutory guiding principles of the SCJC require the making of rules that

are “as easy to use and understand as possible”. The content of the proposed rules has been narrated with that principle in mind.

- *Effective Participation* – the proposed rules are consistent with the existing duty on the judiciary to monitor that those with impairments can understand what is happening during hearings, and that proceedings can be adjusted to support their effective participation

HEALTH AND WELLBEING

Electronic Hearings – negative impacts

- *Video Hearings* - Prolonged time spent in front of screens can cause eyestrain and fatigue for all involved

Reasonable adjustments in working practices:

- *Regular Breaks* - the courts schedule regular breaks to help minimise the adverse health effects that can arise for all participants during a video hearing

OPEN JUSTICE

For those electronic hearings that take place by phone - both registered journalists and members of the public can be provided with dial in links so that they can “hear” those civil proceedings.

For those electronic hearings that take place by video - the approach is slightly different with these hearings as the courts need to develop further safeguards in order to a) identify any potential abuse of process where images of participants (or productions) are recorded and broadcast inappropriately and b) enable any transgressors to be held in contempt in a legally effective manner.

At present:

Registered journalists are able to apply for “attendee” status so they can “see and hear” those civil hearings that take place by video.

	<p>Members of the public are limited to dial in access that means they can only “hear” those civil hearings that take place by video.</p> <p>Once the courts are satisfied that more appropriate safeguards are in place for video hearings it is expected that the approach taken by the courts will change so that the public will have the same access as the press and be able to “see and hear” video proceedings. That future change is anticipated later in 2021/2022 and if commenced it will deliver a further step increase in the ability for justice to be seen to be done.</p> <p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Registered Journalists</i> – the ability for the media to access joining instructions to “see and hear” video hearings, or dial in codes to “hear” telephone hearings has facilitated improved access for those journalists who may otherwise have been unable to observe proceedings from the public gallery in a courtroom • <i>General Public</i> – for those members of the public who would otherwise be unable to physically attend the public gallery in a courtroom, the added ability to “hear” either telephone or video hearings has partially improved their access to justice. <p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>General Public</i> – those members of the public who want the full ability to “see and hear” an electronic hearing without the need to make an application will remain frustrated until such time as the courts can put further safeguards in place and offer that service. <p>REASONABLENESS</p> <p>When a decision is made on the mode of attendance for an individual case following an application by the parties or a direction by the court, the proposed test is that: the court needs to be of the opinion that the mode chosen would not a) prejudice the fairness of proceedings or b) otherwise be contrary to the interest of justice.</p>
AGE	DATA – Compared to the general population there remains a large cohort of the elderly that do not use the internet through personal choice or because they find the use of technology

challenging. The Office of National Statistics (ONS) statistical bulletin on [UK Internet Users](#) indicates that only 54% of adults aged 75 or over were recent internet users (compared to 99% of adults aged 16 to 44). That means the elderly are more likely to be excluded from meaningful participation in an electronic hearing unless they have access to support from friends and family or can access assistance through suitable support providers.

Electronic Hearings – positive impacts

- *Elderly court users who are digitally confident* - will be able to appear online confidently allowing them to avoid the inconvenience of travelling to court, and any unnecessary waiting time in court buildings.
- *Children and vulnerable adults* – there is a significant evidence base confirming that the ability to appear electronically can help to reduce the fear and apprehension, and potential trauma, which may be involved when a child or vulnerable adult makes attends a hearing personally in a court building. Many see access to electronic video hearings as an improved service compared to the existing special measure of a Live TV link.

Electronic Hearings – negative impacts

- *Elderly court users who are not digitally confident* - will struggle to engage with an electronic video hearing particularly if there is any failure to meet accessibility standards via the WebEx platform which would hinder navigation and reading of information, or if there is an inability to support their use of assistive devices.

Reasonable Adjustments in court rules

- *Safeguards* – the proposed rules provide a standing safeguard so that the elderly are able to seek an in-person hearing (rather than attendance at a hearing by electronic means as indicated by a case category) or that change can be directed by the court.
- *Safeguards* – the proposed rules provide a standing safeguard so that a child or vulnerable adult is able to seek attendance at a hearing by electronic means (rather than

	<p>the in-person hearing indicated by a case category) or that change can be directed by the court.</p> <ul style="list-style-type: none"> • <i>Forms</i> - the associated forms include appropriate prompts for using vulnerability, health conditions or impairments as grounds for lodging a motion. <p><u>Reasonable adjustments in digital services</u></p> <ul style="list-style-type: none"> • <i>Accessibility</i> – the digital services provided by the SCTS need to be compliant with the Digital Scotland Service Standard including: accessibility standards for websites, support for assistive devices etc. • <i>Information and Guidance</i> – the SCTS provides a range of information to assist court users including online guidance for attendance at hearings by electronic means. To support video hearings, that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, and links to online support from WebEx for troubleshooting. The guidance includes details for joining hearings by telephone as a backup. • <i>Assisted Digital Support</i> – the SCTS continues to develop its strategy for assisted digital services so that those who have difficulty engaging with electronic hearings due to an impairment can be supported to do so.
DISABILITY	<p>DATA –The Office of National Statistics (ONS) statistical bulletin on UK Internet Users indicates that the number of disabled adults who were recent internet users in 2020 reached almost 11 million (81% of disabled adults) up from just over 10 million (78% of disabled adults) in 2019. Compared to the general population figure (92% recent internet users) that leaves a significant cohort of disabled people (19%) who do not use the internet and they will be excluded from effective participation in an electronic video hearing (unless they have access to suitable support)</p> <p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Disabled court users who are digitally confident</i> - will be able to confidently attend a hearing by electronic means which allows them to avoid unnecessary travel to court, and unnecessary waiting time in court buildings. For some it will also avoid the considerable organisation and

expense that can be involved in arranging support for their travel to and from court buildings

- *Disabled court users with access to support services* - will be able to attend a hearing by electronic means if they have access to appropriate assistance to accommodate their particular disability. Where that's practicable it allows them to avoid unnecessary travel to court, and unnecessary waiting time in court buildings

Electronic Hearings – negative impacts

- *Disabled court users who are not digitally confident* - will struggle to engage with attendance at a hearing by electronic means, particularly if there is any failure to meet accessibility standards via the WebEx platform, or there is an inability to support their use of assistive devices.
- *Disabled court users with significant communication needs* - may be unable to participate effectively in any hearing where attendance is by electronic means and there is a risk that the court could misinterpret their attitude / responses during such a hearing.

Reasonable adjustments in court rules

- *Safeguards* – the proposed rules provide a standing safeguard so that those with a disability are able to seek an in-person hearing (rather than attendance at a hearing by electronic means that may have been indicated for a case category), or that change can be directed by the court.
- *Forms* - the associated forms include appropriate prompts for using vulnerability, health conditions or impairments as grounds for lodging a motion.

Reasonable adjustments in digital services

- *Accessibility* – the digital services provided by the SCTS need to be compliant with the [Digital Scotland Service Standard](#) including: accessibility standards for websites, support for assistive devices etc.
- *Information and Guidance* – the SCTS provides a range of information to assist court users including [online](#) guidance for attendance at hearings by electronic means. To support video hearings that guidance includes: advice on technology requirements and testing of connections before hearings, advice on court etiquette, and links to online

	<p>support from WebEx for troubleshooting. The guidance includes details for joining hearings by telephone as a backup.</p> <ul style="list-style-type: none"> • <i>Assisted digital support</i> – the SCTS continues to develop its strategy for assisted digital services so that those who have difficulty engaging with electronic hearings due to an impairment can be supported to do so.
GENDER REASSIGNMENT	No significant impacts identified
MARRIAGE & CIVIL PARTNERSHIP	No significant impacts identified
PREGNANCY & MATERNITY	<p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Pregnant women who are digitally confident</i> - will be able to attend hearings by electronic means with confidence and reduce the anxiety that can be involved in terms of managing their health during pregnancy. That can allow them to avoid the inconvenience of having to travel to court and the unnecessary waiting time in court buildings. If they already have children or other dependants, it can also assist when working around any other caring commitments.
RACE	<p><u>Electronic Hearings – negative impacts</u></p> <ul style="list-style-type: none"> • <i>Users where language is a barrier</i> – for those who use English as a second language, or who may not understand English at all, there will be significant added complexity when trying to utilise an interpreter during an electronic video hearing. The act of translating within a video hearing can take significantly more time in comparison to that same translation taking place in a physical court setting. <p><u>Reasonable adjustments in court rules</u></p> <ul style="list-style-type: none"> • <i>Safeguards</i> – where the use of an interpreter is required then the standing safeguard in the proposed rules would enable the parties to seek an in-person hearing (rather than attendance at a hearing by electronic means) if that's considered necessary, or that change can be directed by the court. • <i>Forms</i> - the associated forms include appropriate prompts for considering interpretation services and any other issues that might arise as grounds for lodging a motion.

RELIGION & BELIEF	No significant impacts identified
SEX	<p><u>Electronic Hearings – positive impacts</u></p> <ul style="list-style-type: none"> • <i>Users with caring responsibilities –</i> <p>Parties with younger children often have to arrange carers or work around drop off and collection times for school runs and nursery runs. Attendance at a hearing by electronic means is more likely to allow those caring commitments to be met whereas an in-person hearing may require alternative care arrangements to be made to accommodate any delays at court and potential travel times.</p> <p>DATA - Parental caring duties are the responsibility of both parents, however in the UK, Office of National Statistics¹ data show that women carry out an overall average of 60% more unpaid work than men do when it comes to childcare, cooking and housework. The positive impact of these proposals would be of particular benefit to women.</p>
SEXUAL ORIENTATION	No significant impacts identified.

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<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertetheresponsibilityofunpaidwork/2016-11-10>