



ProRPC
STRENGTHENING PROCEDURAL RIGHTS IN POLICE CUSTODY

From law to practice:
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Audio visual recording

FACTSHEET



Irish Council for
Civil Liberties

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Project description

Authors

The Factsheet was developed in the framework of the EU Project 'From law to practice: Strengthening procedural rights in police custody (ProRPC)' implemented by the Irish Council for Civil Liberties (Ireland), in cooperation with the Ludwig Boltzmann Institute of Fundamental and Human Rights (LBI GMR, Austria), APADOR-CH (Romania), Fair Trials Europe (Belgium), and Rights International Spain (Spain).

It was written by Sarah O'Malley and Elizabeth Carthy. The chapter on the regional challenges draws heavily on work of Fair Trials Europe, who conducted in depth regional research in the framework of this Project.

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Information about the Project and Factsheet

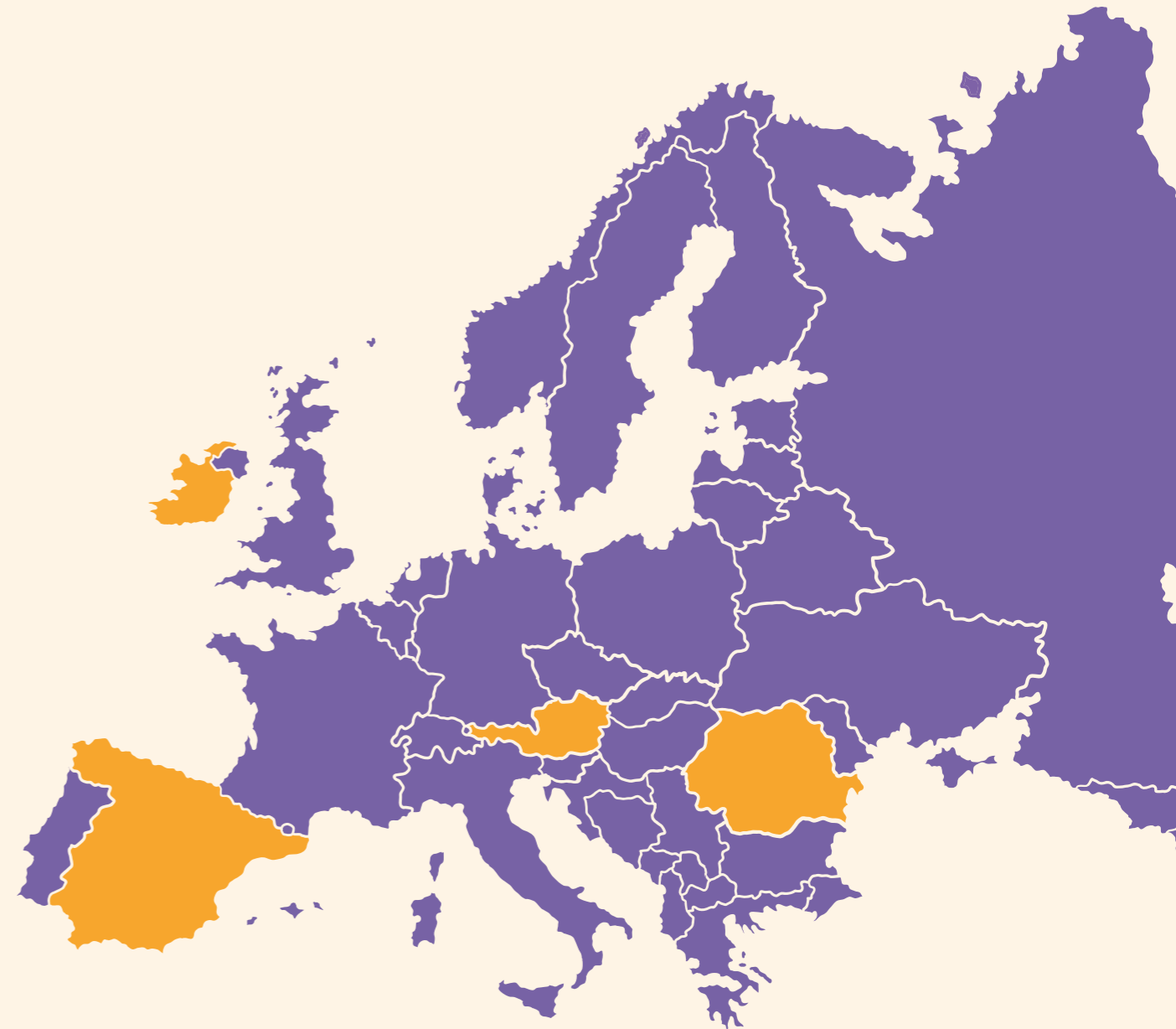
The Factsheet highlights the relevance of audio-visual recording during the criminal investigation phase. It reflects on identified challenges and discusses promising practices. The goal is to respond to the question WHAT can be done to strengthen procedural rights. To this end, the Factsheet unpacks the key elements of the promising practices and attempts to identify lessons learnt. Thereby, the Factsheet not only describes the promising practices, but also investigates three main questions:

- What are the main benefits of the promising practices?
- How did the promising practices come about? (e.g. What triggered their implementation? What were the challenges faced beforehand?)
- What are the remaining challenges in the implementation of the promising practices?

The Factsheet is intended for all criminal justice actors and advocates who are interested in reforming their national system. The research on the promising practices focused especially on the practices of four EU Member States: Austria, Ireland, Spain, and Romania. Additional practices and examples from other EU Member States were gathered via regional consultations as well as the regional research conducted by Fair Trials Europe.

As each practice came about in a specific national context, in order to successfully replicate them, it will always be important to tailor them to the national contexts, dynamics and cultures. Yet we hope that disseminating information on the reform processes occurred in other countries can offer useful inspiration to strengthen procedural rights and overcome existing barriers.

Other factsheets of the series cover the areas of access to a lawyer, legal aid, and access to information. The factsheets should be read in combination with the final report that provides insights into HOW the envisaged change can be achieved.



Project definitions

An Garda Síochána

Police service for the Republic of Ireland. Members of An Garda Síochána can be called gardaí (plural) or garda (singular) or, informally, be referred to as guards. A police station is called a garda station.

Audio recording

Audio recording means a recording made on any device on which sounds are recorded so as to be capable of being reproduced.

Audio-visual recording (AVR)

Audio-visual recording means a recording on which images, including images accompanied by sound, are recorded or otherwise stored, including motion picture film, video cassette, video tape, video disc, other recording mediums or a copy that duplicates in whole or in part the original.

Child

A child is any person below the age of 18 years, as provided by Art 1 of the UN Convention on the Rights of the Child (CRC). When referring to a child who is a suspect or accused person, the term child may extend to persons older than 18 in certain cases as established by the EU Directive (EU) 2016/800 of 11 May 2016.

Interview

The questioning of a suspect or accused person by a law enforcement officer regarding their alleged involvement in a (criminal) offence.

Lawyer

A person qualified and authorised according to national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters. In Ireland, there are two types of lawyers, solicitors who attend police stations and barristers who generally present cases in court.

Member in Charge/Custody Officer

The Member in Charge in a garda station is the garda who is in charge at the station of ensuring rights in custody are enforced pursuant to the Custody regulations (the rules which provide for AVR). As far as practicable, they are not involved in the arrest of a person who is in custody or in the investigation of that offence.

Persons in a situation of vulnerability

Any person who, because of his or her specific situation or circumstances, requires specific care, attention or assistance.

Transcription

The interpretation of an audio, video, or audio-video recording that is memorialised in a written transcript for use in a court proceeding.

Introduction

Audio-visual recordings (AVRs) of police interviews not only ensure the protection of those being interviewed, but also guard the police against false accusations of mistreatment or coercion. They also have the benefit of strengthening any evidence of admissions or confessions made while in police custody. An AVR is the best evidence of what happened during the course of an interview. It is an objective record of events in which body language, tone of voice and demeanour can all be assessed by an independent third party.¹

AVR also contributes to transparency, which in turn improves public trust in the police and ultimately leads to lasting changes in police behaviour as regards questioning techniques and procedures. This is crucial in criminal justice systems where coercive or deceptive questioning techniques aimed at obtaining confessions are still used, despite the growing consensus that these lead to false confessions and miscarriages of justice.² In fact, AVR supports the shift in the focus of interviews away from confessions towards interview techniques which seek to determine what actually happened and thus becomes an important safeguard against the contamination of interviews and the risk of false confessions. AVRs could also be used to improve professionalism in policing and for training of police officers. AVR can shed light for researchers on policing.³

When compliance with rights guaranteed by the EU procedural rights Directives⁴ is challenged, it is difficult to determine what actually happened during interviews that took place behind closed doors.⁵ AVR has the potential to ensure the effective application of other rights and can make the process sufficiently transparent to enable suspected persons to efficiently challenge procedural rights violations.⁶

In particular, it can help ensure that:



- suspected persons are correctly informed about their rights in a clear and accessible manner at the beginning of the interview, especially about the right to be assisted by a lawyer, information that is not always correctly conveyed by investigative authorities in practice;⁷



- quality interpretation services are provided during the interview;⁸



- undue coercion, torture and other ill treatment during questioning are prevented;⁹



- investigation of any allegations of procedural violations or ill-treatment are facilitated, which is in the mutual interest of the interviewer and the interviewee.¹⁰

1. Organisations such as the Innocence Project have documented the importance of AVRs in guarding against wrongful convictions obtained on the basis of false confessions. The Innocence Project, 'False Confessions & Recording Of Custodial Interrogations' <<https://innocenceproject.org/false-confessions-recording-interrogations/>> accessed on 5 December 2022.

2. *ibid.*

3. Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, § 160 <<https://interviewingprinciples.com>>.

4. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, 1 (Directive on the right to interpretation and translation); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, 1 (Directive on the right to information); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, 1 (Directive on access to a lawyer); Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, 1 (Directive on the presumption of innocence); Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, 1 (Directive on procedural safeguards for children); Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, 1 (Directive on legal aid).

5. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 4, <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>.

6. Justicia Network, 'Inside Police Custody 2', (2018), p. 58, <<https://www.fairtrials.org/articles/publications/inside-police-custody-2/>>.

7. Thus protecting the rights enshrined in the Directive on the right to information. EU Agency for fundamental rights (FRA), 'Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings', p. 40-44,

8. Thus protecting the rights enshrined in the Directive on the right to interpretation and translation. Justicia Network, 'Inside Police Custody 2', (2018), p. 40, <<https://www.fairtrials.org/articles/publications/inside-police-custody-2/>>.

9. Thus protecting the rights enshrined in the UN Convention against Torture. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 4, <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>; SRT (Mendez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/71/298, § 84 [hereinafter: SRT (Mendez) A/71/298]; ECtHR, Doyle v Ireland, App No 51979/17, § 99; CPT, 12th General Report, CPT/Inf (2002)15, § 36, <https://rm.coe.int/1680696a76>; see also Fair Trials and Hungarian Helsinki Committee, 'Meeting report – Experience-sharing Event on Audio-visual Recording of Interrogations in Criminal Proceedings', 9 November 2018.

10. Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, § 177 <<https://interviewingprinciples.com>>.

International and European standards

From an international human rights perspective, the use of AVR in police interviews is best practice.¹¹

At an international level, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in 2016 found that the “*recording of interviews is a fundamental safeguard against torture, ill-treatment and coercion and ought to apply in the criminal justice system and in connection to any form of detention. Every reasonable effort must be made to record interviews, by audio or video, in their entirety.*”¹² The UN Special Rapporteur in a 2002 report found that “[e]vidence from non-recorded interrogations should be excluded from court proceedings”.¹³

The new international *Principles on Effective Interviewing for Investigations and Information Gathering* (the “Principles”), released in May 2021,¹⁴ aim to change how public authorities conduct interviews and as a result improve trust in States’ interview processes. They provide guidance for interviewers to obtain reliable information in full respect of human rights and procedural safeguards and, in that regard, recommends the AVR of the entire interview.¹⁵

The United Nations Committee against Torture (CAT) recommends AVR as an effective method of prevention of torture and other forms of ill-treatment.¹⁶ The Committee consistently recommends that States should make AVR an obligatory, standard, and systematic procedure,¹⁷ and provide the necessary resources for same.¹⁸ The CAT recommends that AVR be used in all interviews, regardless of the type of crime.¹⁹ Finally, the CAT recommends that the footage be kept in secure facilities for a period sufficient for it to be used as evidence, and made available²⁰ to all competent judicial authorities, to detainees, their lawyers and family members,²¹ and others as appropriate.²² The recommendation of making AVR mandatory is also one adopted by the UN Human Rights Committee.²³

11. See for example the Directive on procedural safeguards for children that proscribes AVR for childrens’ interviews; European Commission, ‘Commission recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings’, (2013/C 378/02) <[https://www.apt.ch/sites/default/files/inline-files/apt_PoEI_EN_08.pdf](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224(02)&from=EN#:~:text=The%20aim%20of%20this%20Recommendation,(vulnerable%20persons)>.” This prescribed that questioning of adults in vulnerable situations at the pre-trial investigation phase should be audio-visually recorded (point 13); Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, § 99 <.

12. SRT (Mendez) A/71/298, § 84.

13. SRT (van Boven) ‘Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38’ (2002) E/CN.4/2003/68, § 26(g). See also SRT (Rodley) ‘Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment’ (2001) A/56/156, § 34.

14. Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, <<https://interviewingprinciples.com>>.

15. *ibid.*, §§ 99 and 176.

16. CAT, ‘General Comment No 2 on the Implementation of Article 2 by States Parties’ (2008) UN Doc CAT/ C/ GC/ 2, §§ 13-14.

17. CAT, ‘Concluding Observations: Macedonia’ (2022) UN Doc CAT/ C/MNE/CO/3, § 19(g) “Ensure the systematic video recording of the questioning of suspects in custody, and establish mandatory instructions for the storage of recordings, including a prescribed minimum duration.”; CAT, ‘Concluding Observations: China’ (2016) UN Doc CAT/ C/ CHN/ CO/ 5, § 34; CAT, ‘Concluding Observations: Liechtenstein’ (2016) UN Doc CAT/ C/ LIE/ CO/ 4, § 12.

18. CAT, ‘Concluding Observations: Qatar’ (2013) UN Doc CAT/ C/ QAT/ CO/ 2, § 10; CAT, ‘Concluding Observations: Armenia’ (2017) CAT/ C/ ARM/ CO/ 4, § 12.

19. CAT, ‘Concluding Observations: France’ (2010) UN Doc CAT/ C/ FRA/ CO/ 4-6, § 16.

20. CAT, ‘Concluding Observations: Honduras’ (2016) UN Doc CAT/ C/ HND/ CO/ 2, § 12.

21. CAT, ‘Concluding Observations: Spain’ (2015) UN Doc CAT/ C/ ESP/ CO/ 6, § 11; CAT, ‘Concluding Observations: Jordan’ (2016) UN Doc CAT/ C/ JOR/ CO/ 3, § 24; CAT, ‘Concluding Observations: Armenia’ (2016) UN Doc CAT/ C/ ARM/ CO/ 4, § 12.

22. CAT, ‘Concluding Observations: Kyrgyzstan’ (2013) UN Doc CAT/ C/ KGZ/ CO/ 2, § 9.

23. UN Human Rights Committee, ‘List of issues prior to submission of the seventh periodic report of Japan’ (2017) UN Doc CCPR/C/JPN/QPR/7, § 12.

At a regional level, the European Committee for the Prevention of Torture (CPT) has, on a number of occasions, stressed the importance of AVRs in ensuring the protection of detainees. In its General Report in 1992, the CPT noted that AVRs of police interviews are a “*useful safeguard*” for both detainees and the police.²⁴ In a further report in 2002, the CPT again noted the many benefits.²⁵

The European Court of Human Rights has found in one case that AVR is “*an important safeguard as it doubtless acted to maintain pressure on the police to act in conformity with the law. It also enabled the domestic courts to make well informed decisions when considering whether it was possible to admit the evidence obtained in police interview.*”²⁶

At an EU level, AVRs are only mandated when interviewing children under the Directive on procedural safeguards for children. However, AVR is only afforded where it is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child’s best interests are always a primary consideration. Yet, as to date, there is no requirement at the EU level to audio-visually record police interviews for all adult suspected persons.

24. CPT, 1992, “*Police custody*”, Extract from the 2nd General Report of the CPT, CPT/Inf(92)3, § 39. <<https://rm.coe.int/16806cea2f>>.

25. CPT, 2002, “*Developments concerning CPT standards in respect of police custody*”, Extract from the 12th General Report of the CPT, CPT/Inf(2002)15, § 36 <<https://rm.coe.int/16806cd1ed>>.

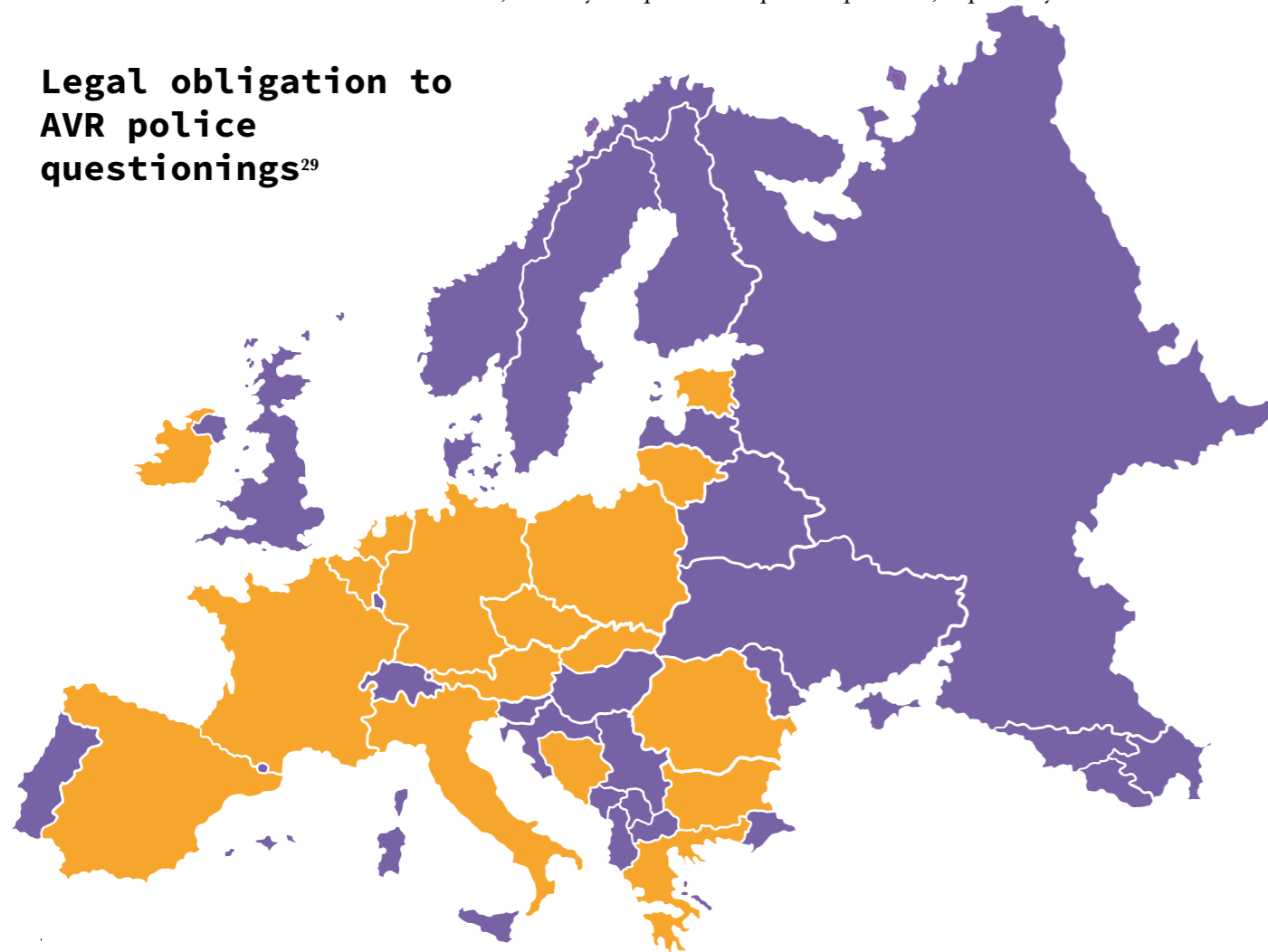
26. ECtHR, *Doyle v. Ireland*, Application no. 51979/17, § 99.

Regional challenges

At an EU level, AVRs are only mandated when interviewing children under the Directive on procedural safeguards for children.²⁷ However, AVR is only afforded where it is proportionate in the circumstances of the case, taking into account, *inter alia*, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child's best interests are always a primary consideration. Yet, as to date, there is no requirement at the EU level to audio-visually record police interviews for all adult suspected persons.

In the absence of a general requirement at the EU level, AVR of police interviews is not often enshrined in domestic laws. At the time the PROCAM research was conducted in 2018, only four countries within the EU, namely Croatia, Romania, Ireland and Portugal had adopted laws providing for a general obligation to audio visually record questionings of all suspected persons.²⁸ Some States have introduced an obligation to audio-visually record interviews in their legislation but have limited it either to certain victims and witnesses, or only to specific suspected persons, especially children.

Legal obligation to AVR police questionings²⁹



27. Directive on procedural safeguards for children, Article 9.

28. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 11-27, <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>.

29. Ibid. The 2018 data was updated with Fair Trials regional survey in 2021 for Greece, Bulgaria, Romania, Spain and Croatia.

	For all suspected persons	Only for suspected persons placed in detention	Only for children who are suspected or accused of crime	Only for adult persons in a situation of vulnerability	for all suspected persons
Belgium	X	X	X	X	X
Bulgaria	X	X	X	X	X
Croatia	V				
Czech Republic	X	X	X	X	X
Cyprus	X	X	X	X	X
Estonia	X	X	X	X	X
France	X	X	X	X	V
Germany	X	X	X	X	V
Greece	X	X	X	X	X
Italy	X	V	X	X	X
Ireland		V			
Lithuania	X	X	X	X	X
Netherlands	X	X	V	V	V
Poland	X	X	X	X	X
Portugal	V				
Romania	V				
Slovakia	X	X	X	X	X
Spain	X	X	X	X	X

Explanation of symbols: "X" means no legal obligation to AV record police questionings of the respective group of suspected persons or for certain offences only exists in the country, "V" means a legal obligation does exist.

29. Ibid. The 2018 data was updated with Fair Trials regional survey in 2021 for Greece, Bulgaria, Romania, Spain and Croatia.

The practice of audio-visually recording police interviews remains poorly applied in the EU. The prevailing practice remains for the interviewing officer to produce a written record.³⁰ Written records are typically not sufficiently detailed to test the reliability of the confession, whereas an AVR provides an independent corroboration of the suspected person's declarations, secures reliable evidence for criminal proceedings and offers a key protection against false confessions and wrongful convictions.³¹

In those jurisdictions where AVR is incorporated in domestic law, the following factors have been found to hinder its effective implementation in practice.



Limited scope of application. In many States, AVR only applies to children, witnesses and victims. In Belgium, for example, it is restricted to victims and witnesses who are children in the context of interviews relating to an exhaustive list of crimes.³² In Estonia, only interviews of underage witnesses must be audio-visually recorded where the evidence obtained is intended to be used at trial.³³ In other countries, such as Ireland, it is limited to persons placed in detention (adults and children) but does not extend officially to suspected persons who are not deprived of their liberty (including children).³⁴ In some jurisdictions, it is limited to certain type of offences. For example, in France, AVR only applies to persons who are suspected of the most serious offences,³⁵ which deprives many people of that guarantee and raises concerns regarding the principle of equality before the law.³⁶



Procedural difficulties in using the recording. In many countries, recordings are not automatically disclosed to the defence as part of the casefile. For example, in France, they are only made available to the defence in the event of a dispute with respect to the contents of the interview. If the suspected person wants to access the recording, they must apply for access to the instructing judge or the tribunal, who routinely refuse such applications.³⁹ As a consequence, it is rare for defence counsel to rely upon AVRs. By way of example, in 2018, out of 200 cases handled by an instructing judge in one year, only one suspected person requested to see the recording.⁴⁰ Lastly, recordings are destroyed after the expiry of a 5-year period from the start of the proceedings, which seriously limits the possibility to challenge violations of procedural rights since criminal cases usually last more than five years, especially where cases are appealed.⁴¹



Conversations and abuse outside the interview room. AV recording is not an absolute safeguard against coercion and abuse, as these can still happen outside the interview room, for example upon arrest or during transfer to the police station.⁴² In Ireland, there were concerns amongst practitioners with regard to communications with the suspected person before the interviews – deals, promises, threats for instance – that are not recorded.⁴³ However, although it is true that AVR are not sufficient to prevent undue pressure and ill-treatment before the interview, they still can reveal bruises, other signs of violence or hints of previous informal contacts between the police and the questioned person.⁴⁴



Technical problems. In Portugal, although AVR of all police questioning is required by law, interviews are often not recorded in practice due to lack of means, as it is rare for police stations to be equipped with the necessary technology.³⁷ In Romania, only some police services and specialised prosecutor's offices (namely in anticorruption and anti-organised crime) have the necessary recording technical equipment.³⁸

30. *ibid*, p.27.

31. *ibid*, p.4.

32. *ibid*, p.22.

33. *ibid*, p.18.

34. *ibid*, p.19.

35. Except for children for which the interview must always be recorded.

36. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 14, <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>. Fair Trials and Hungarian Helsinki Committee, *Meeting report – Experience-sharing Event*, p.5, where it is noted that when the law was introduced, the police indeed opposed to an extension of the requirement to AV record the questioning of all suspected or accused persons as it would have been too time consuming and there were not sufficient resources.

37. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 16 <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>.

38. *ibid*, p.17 (which was confirmed by Fair Trial's regional survey).

39. *ibid*, p.14.

40. Fair Trials and Hungarian Helsinki Committee, *Meeting report – Experience-sharing Event*, p.5.

41. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 14 <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>.

42. For example, in *X v Burundi*, the CAT found that the complainant was tortured upon arrest as he was beaten kicked in the chest, ribs, back, and head while a weapon was pointed at his head. CAT, *X v Burundi*, No 553/ 2013, UN Doc CAT/ C/ 55/ D/ 553/ 2013, 10 August 2015.

43. Fair Trials, 'PROCAM International Desk Report, audio-visual recording during interrogations' (2018), p. 15 <<https://www.fairtrials.org/articles/publications/audiovisual-recordings-during-interrogations/>>.

44. Fair Trials and Hungarian Helsinki Committee, *Meeting report – Experience-sharing Event*, p.5 and 12.

Promising practices on audio-visual recording



Promising practice from Ireland

Description of the practice

In Ireland the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 provide for interviews of persons arrested for serious offences and detained under specific legislation to be electronically recorded, or recorded in writing where electronic recording is not practicable. However, in practice, all interviews (of those detained and those voluntarily there or arrested under other legislation) are electronically recorded by AVR as well as recorded in writing, which slows down the interview process considerably. VHS tapes were originally used however now DVDs are used.

There are provisions in the Regulations relating to the security of the tapes – the sealed master tape is given to the Member in Charge who makes a note of this in the detained person’s custody record⁴⁵ – and the destruction of the tapes.⁴⁶ Six months from the date of the interview, a suspected person may apply for the tapes to be destroyed.⁴⁷ The tapes will be destroyed if proceedings have not been instituted (not if the suspected person has absconded) or the suspected person has been acquitted or discharged or the proceedings were discontinued. The suspected person, their legal representative or a person authorised to act on their behalf is entitled on request to witness their destruction. However, if there are civil proceedings ongoing and if a party serves notice to the police that the tape may be required, the tape will not be destroyed until six months from the conclusion of the proceedings or until the conclusion of any proceedings on appeal.⁴⁸

In terms of the exclusion of evidence, currently, if the regulations (as secondary legislation) are not complied with that does not render the evidence in itself inadmissible⁴⁹ leaving the court the discretion to disallow any admissions made in the course of the interview. A court will look at the circumstances of the case and determine cumulatively if they affect the admissibility of the statement.⁵⁰ However, if the overall fairness of the case dictates, the court will have discretion not to forgive a breach of the regulations.⁵¹ The trial judge will decide on the impact of the breach of the regulations and whether the accused had been prejudiced.⁵² However, current draft legislation⁵³ will put AVR on a statutory

45. Electronic Recording of Interview Regulations, 1997, regulation 13.

46. Electronic Recording of Interview Regulations, 1997, regulation 14.

47. *ibid.*

48. Electronic Recording of Interview Regulations, 1997, regulation 14(4).

49. Criminal Justice Act 1984, section 7(3) generally and section 27(4) specifically on AVRs which holds “Any failure to comply with a provision of the regulations shall not by itself render a person liable to civil or criminal proceedings, and (without prejudice to the power of the court to exclude evidence at its discretion) shall not by itself render inadmissible in evidence anything said during such questioning”

50. See also for example, *The People (DPP) v P.A.* unreported [2008] IECCA 21, where a claim that the regulations were breached were dismissed as the cumulative effect of the circumstances relied on did not have the effect of rendering the statement inadmissible.

51. See for example, *The People (DPP) v Christopher Crowe unreported* [2015] IECA 9, § 67.

52. *DPP v Diver* [2005] 3 IR 270.

53. An Garda Síochána (Powers) Bill 2021, <[http://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](http://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)> .

footing. Once in primary legislation, evidence gathered in an interview that was not electronically recorded will be illegally obtained. Illegally obtained evidence can still be admitted at trial at the discretion of the trial judge based on an assessment of the totality of the circumstances. However, it is possible that interviews carried out without AVR will impact a suspected person’s constitutional rights, namely the right to a fair trial. In circumstances where evidence is found to be unconstitutionally obtained it will be excluded, but only if it was obtained by way of a “deliberate and conscious” violation of constitutional rights.⁵⁴ Thus the exclusionary rule in Ireland in practice is quite weak and subject to an “inadvertence exception”.⁵⁵

The current draft legislation makes AVR a legal obligation excluding situations where the recording equipment or a recording medium is not available for use or fails to work at the commencement of an interview or through the course of the interview. In those cases the interviews will be recorded in writing.

The cost in EURO of AVR for the police for the past seven years was obtained via a freedom of information request.

Year	Spend on Equipment	Other*	Support & Maintenance
2015	10,193.54	–	96,888.44
2016	675,792.35	–	86,775.40
2017	72,576.62	1,106.63	148,808.43
2018	23,660.63	–	163,424.20
2019	15,697.08	2,111.66	165,283.64
2020	32,287.94	2,809.13	59,140.59
2021	107,667.58	6,460.37	132,116.87
2022	–	686,68	81,321.78

* Other (relocation, re-installation, etc.)

<[http://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](http://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)> .

54. See *DPP v JC* [2015] IESC 31.

55. For example, in a recent case before the Special Criminal Court evidence was deemed admissible despite it being gathered unconstitutionally, see <<https://www.independent.ie/irish-news/crime/regency-trial-illegally-taped-gerry-hutch-conversations-can-be-used-in-evidence-in-the-interest-of-justice-42190897.html>> .

Benefits

The AVR of police interviews has become standard practice for Ireland. As professionals consulted in the framework of this project highlighted, this practice is of benefit not only to detained persons but also to police and it is in the interests of justice and the administration of justice. It has been highlighted that police Gardaí “regard the facility as a safeguard for both the Gardaí and the interviewee alike.”⁵⁶ The Secretary General of the Department of Justice highlighted in 2003, how: “Solicitors are full of praise for the [AVR] system because, in their view, it is a marked improvement on the situation where nobody knew precisely what had happened in the making of statements. There were a lot of arguments about what had actually happened when somebody was taken in for interview. It is now all on tape.”⁵⁷

The practice can provide a safeguard for the police in protecting against any allegations of ill-treatment during interviews in police custody. However, as experts highlight, despite the benefits of this practice, it has not prevented all ill-treatment in Garda stations in Ireland.⁵⁸

The CPT noted in their report on their visit to Ireland in 2006 that AVR had become mandatory for certain offences in Ireland. The CPT noted: “The findings during the 2006 visit suggest that audio-video recording in the interrogation rooms of Garda stations may have been a significant contributing factor to reducing the amount of ill-treatment alleged by persons detained under the above-mentioned legislation. By contrast, the CPT’s delegation found that persons arrested and interviewed by the police, who did not fall within the above legislation and hence whose interviews were not usually audio-video recorded, ran a greater risk of ill-treatment by Garda officers. This was particularly the case when the suspects were foreign and/or drug addicts.”⁵⁹

The courts in Ireland have also stressed the importance of ensuring that interviews are recorded. For a number of years, the former Court of Criminal Appeal⁶⁰ warned An Garda Síochána that a failure to record interviews without extraordinary circumstances justifying such a failure could result in any admissions or confessions obtained being excluded from trial, emphasising that AVRs were vital to the integrity of the investigative process.⁶¹

Similarly, the Morris Tribunal, a public inquiry set up in 2002 to investigate policing complaints acknowledged the importance of the practice of AVRs of interviews for protecting the rights of interviewees and safeguarding interviewers from false allegations of ill-treatment.⁶² Another benefit highlighted by the Morris Tribunal is that it can be “a very effective tool by which they [An Garda Síochána] can review the performance of their interviewers and learn from any mistakes that are evident from any particular interview.”⁶³ It also recommended that, in line with good practice from other jurisdictions, “consideration be given to the external audio visual monitoring of interviews as they progress, in particular in respect of interviews concerning more serious crime and that this monitoring be conducted by a senior officer, preferably an interview specialist in a position to offer appropriate advice.”⁶⁴

Thus, the practice of AVRs could improve the conduct of interviews, both in real time if external monitoring were introduced, and in terms of capacity building and training by the review of the recordings.

56. Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons, Third Report, 2004, p. 9, <https://www.justice.ie/en/JELR/AudioVideoReport.pdf/Files/AudioVideoReport.pdf>. [hereinafter: AVR Committee Report 2004].

57. Committee of Public Accounts, Special Report No. 5 - Garda Interview Recording Systems, 26 June 2003, <https://www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2003-06-26/3/>.

58. Dr. Vicky Conway and Prof. Yvonne Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’, (2019), 3 IJSJ.

59. CPT, Report on Ireland, 2006, CPT/Inf (2007) 40, § 19, <https://rm.coe.int/1680696c96>.

60. Now simply the ‘Court of Appeal’ since the Court of Appeal Act 2014 came into effect.

61. See People (DPP) v. Connolly [2003] 2 IR 1, People (DPP) v. Murphy [2005] 4 IR 504 and People (DPP) v. Diver [2005] 3 IR 270.

62. Morris Tribunal, Report of the Tribunal Inquiry - Report on the detention of ‘suspects’ following the death of the late Richard Barron on the 14th of October 1996 and related detentions and issues, Volume 3, 2008, pp. 1244-1245, <https://www.garda.ie/en/about-us/publications/general-reports/morris-tribunal-report-vol-3.pdf>>, p. 1244-1245.

63. *ibid.*, p. 1218.

64. *ibid.*

Consultations with professionals in the context of this project highlighted the benefits and presented by AVR. It was cited as one of the most important protections safeguarding the rights of detained persons. An AVR can lead to the clarification of important discrepancies that may be key to the defence of the case. Both defence lawyers who were consulted outlined different cases when the AVR demonstrated a different meaning to a phrase than was ascribed to it in the transcript due, for example, to a gesture, that was integral to the successful defence of a case.

How it came about

AVR of police interviews is not a new procedural safeguard in Ireland.⁶⁵ The Irish Criminal Justice Act 1984 already envisaged the power of the Minister for Justice to introduce it.⁶⁶ However, these regulations were not introduced until 1997.

The road that paved the way for the adoption of these regulations started in 1977 following a report by Amnesty International into allegations of ill-treatment in garda custody. It wasn’t until November 1989, when the Irish Government established a Committee to enquire into certain aspects of Criminal Procedure, the Martin Committee.⁶⁷ The establishment of this Committee followed a number of scandals and cases of miscarriages of such as the reversal in the United Kingdom (UK) of the “Guildford Four” wrongful convictions for the Guildford pub bombings carried out by the Provisional Irish Republican Army in the UK and other Irish miscarriages of justice in the UK.⁶⁸ Thus, it was a political priority at the time to ensure that the procedural rights of detained persons were respected to avoid further miscarriages of justice. Audio recording had been introduced in the UK in the Police and Criminal Evidence Act 1984, following “growing judicial and public criticism of police conduct when dealing with suspects” including in relation to the Guildford Four case.⁶⁹ In 1990, the Martin Committee recommended that the questioning of detained persons should be recorded audio-visually and this practice should be introduced on a pilot scheme basis in selected police stations.⁷⁰

A Steering Committee on Audio and Audio/Video Recording of Garda questioning of detained persons was established in 1993.⁷¹ Under its supervision, a pilot scheme operated in selected Garda

65. By way of background on other procedural rights in custody: there is no mandatory representation in police interviews in Ireland although lawyers have been allowed attend interviews since 2014 by way of an informal agreement. This is due to be codified into law by the Garda Síochána (Powers) Bill 2021. Ireland only opted in to the EU Directives on the right to information and the Directive on interpretation and translation. Ireland has not opted into the other Directives on access to a lawyer, legal aid, procedural safeguards for children, presumption of innocence and the right to silence.

66. Criminal Justice Act 1984, section 27(1) <<https://www.irishstatutebook.ie/eli/1984/act/22/enacted/en/html>>.

67. Dáil Éireann debate, 29 November 1989 <<https://www.oireachtas.ie/en/debates/debate/dail/1989-11-29/36/>>. The Committee’s mandate was “Given that uncorroborated inculpatory admissions made by a suspected or accused person to the Garda Síochána can be sufficient evidence to ground a conviction, to examine whether additional safeguards are needed to ensure that such admissions are properly obtained and recorded and to make recommendations accordingly.”

68. In 1989 the Guildford Four were released after 15 years in prison. In 1990 the Birmingham Six and the Maguire Seven were also released. The Royal Commission on Criminal Justice set up in their wake reported in 1993, Royal Commission, Report on Criminal Justice (Cmd 2263, 1993), also known as the Runciman Report, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf>. R. v. Anne Maguire, Patrick Joseph Maguire, William John Smyth, Vincent Maguire, Patrick Joseph Paul Maguire, Patrick O’Neill and Patrick Conlon (1991) 94 Crim. App. R. 133. Other examples include the Sallins Mail Train Robbery in 1976 which Nicky Kelly was pardoned in 1992 after being sentenced in 1978 to 12 years in prison for a crime he did not commit following a conviction primarily based on a forced confession, see “Former councillor Nicky Kelly, wrongfully convicted of Sallins train robbery, said he is 45 years waiting for apology”, Irish Independent, 19 January 2022, <<https://www.independent.ie/regionals/wicklow/news/former-councillor-nicky-kelly-wrongfully-convicted-of-sallins-train-robbery-said-he-is-45-years-waiting-for-apology-41253859.html>>. Osgur Breatnach was also wrongfully convicted for this high-profile robbery and continues to seek justice today. See “Osgur Breatnach’s dogged 45-year search for justice”, Irish Independent, 4 September 2021, <<https://www.irishexaminer.com/news/spotlight/arid-40372718.html>>. See also Dr Vicky Conway, Not too late for State to atone for past crimes’, the Irish Examiner, 26 January 2022, <<https://www.irishexaminer.com/opinion/commentanalysis/arid-40792812.html>>.

And

69. KRW Law, ‘The role of the solicitor at the police station’, (2017), p. 1, <<https://krw-law.ie/wp-content/uploads/2017/05/The-Role-of-a-Solicitor-in-the-Police-Station-PACE-IPLS-8.3.17.pdf>>.

70. AVR Committee Report 2004, p. 1.

71. The Committee’s mandate was two-fold. First, to make recommendations to the Minister for Justice, in relation to field trials: their location, essential modifications to be made to interview rooms, police training required, the type of equipment to be used, whether any amendments to the Judges’ Rules may be necessary, special arrangements for organised crime or terrorism cases to ensure, in particular, that intelligence gathering is not affected, a code of practice on inter alia the suspected person’s rights, admissions off camera (at the scene, on the way to the station, etc.), interruption of the interview for any reason, technical breakdowns during the interview, opportunity for the suspected person to clarify etc. Secondly, to make arrangements in relation to the pilot scheme on stringent scientific monitoring of the scheme, assessment of the operation and cost of the scheme, the likely effects

stations between 1994 and 1999. The initial pilot scheme in one station faced challenges, such as a “reluctance on the part of detainees to consent to being interviewed using electronic recording.”⁷² This resulted in a lack of statistical data for the pilot scheme. To address this, a full pilot scheme was developed and carried out in four Garda stations.⁷³ However, take up rates continued to be low. The Steering Committee requested the Minister of Justice to introduce regulations for mandatory electronic recording.⁷⁴ In 1997, the Electronic Recording of Interview Regulations were introduced, which provided for the recording of most police/detainee interviews.⁷⁵

The regulations apply to all stations where recording equipment has been provided and installed. They also set out different safeguards in relation to the practice of the recording, discussed further below.⁷⁶ Following the introduction of the regulations, the rate of electronic recording of interviews “increased dramatically.”⁷⁷ The Steering Committee in its second report in 1999 strongly recommended that a nationwide scheme of AVR should be introduced, based on the experience of the pilot scheme. The Government accepted its recommendations and authorised a nationwide scheme in 1999.⁷⁸ In order to roll out a nationwide scheme, different measures had to be taken, including the procurement and installation of necessary equipment, changes to the layout and soundproofing of interview rooms to ensure that the recordings were of a good quality, and the training of police on the practice of AVR. The 2004 final report of the Steering Committee highlighted the different measures that had to be taken to roll out the system.⁷⁹

of audio and AVR on the criminal justice system as a whole and the extent to which the pilot scheme shows that an effective and economic basis can be found for a national scheme and a report on the outcome of such assessment. The Committee was chaired by a Judge and included police, defence and prosecution lawyers, Department of Justice representatives and a Professor of electronic engineering.

72. AVR Committee Report 2004, p. 2.

73. The Committee had recommended that the pilot scheme be carried out in two stages; (i) preliminary, optional, scheme confined to one police Station and subsequently through a full pilot scheme, in accordance with agreed terms of reference. In 1994 the scheme began in Tallaght but as it was based on the consent of detainees. Only 8-9% of detainees consented to being recorded. Accordingly, the Committee decided to proceed with a full pilot scheme in a total of four Garda stations. Take up rates remained low (13% on average by 1995).

74. Under section 27 of the Criminal Justice Act, 1984.

75. Vicky Conway and Yvonne Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’, 2019, 3 IJSJ.

76. The regulations were subsequently amended in 2009 and 2010.

77. AVR Committee Report 2004, p.2.

78. *ibid.*, p. vii.

79. They also found that 132 of the 167 Garda stations used for interviewing were equipped with the necessary equipment. See Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons, Third Report.

Remaining challenges

While AVR of interviews is commonplace in Ireland and best practice, some legal challenges persist.

Challenge 1. Scope of the law

While most interviews are recorded in practice, the regulations only apply to stations where the equipment has been provided and installed and where the person being interviewed has been detained under specific provisions (currently six pieces of legislation).⁸⁰ Therefore the regulations do not apply if a person voluntarily attends a police station to give a statement, which is quite common in circumstances where being arrested goes on record. Interviews do not have to be recorded even under the relevant legislation if the Member in Charge certifies that the equipment is not working, or is not available due to being already in use or is otherwise not practicable and to delay the interview would hinder the course of justice.⁸¹ However, given strong judicial commentary over the years it is extremely rare in practice for the police not to electronically record an interview. In practice, the police simply take the suspected person to another station where AVR facilities are available. The more pressing issue is when suspected or accused persons are not deprived of their liberty.

Challenge 2. Accessibility of information on AVR

The regulations outline that the Member in Charge must inform, orally and in ordinary language, the person to be interviewed that the interview may be electronically recorded and that if it is, they are entitled to receive a notice as to what happens to the tapes of the interview.⁸² Further, this written notice includes information on the process of recording an interview. For example, the Member in Charge must give a specific caution to the person being interviewed and state certain details, including the name and rank of any garda members present, the date, time of commencement of the recording and the location of the station, and the name of the person being interviewed.⁸³ However, this information is currently not available in plain English or in an easy read format. Pictures of the equipment would be useful for children and suspected or accused persons with Autism Spectrum Disorder (ASD) or an intellectual disability.⁸⁴

Challenge 3. Storage and destruction of tapes/updates in technology

The regulations regulate the process to be implemented if there is a break in the interview and the procedure is onerous.⁸⁵ If a person is detained for the maximum 7 days and interviewed each day with numerous breaks, a huge number of tapes would be needed and subsequently stored.⁸⁶ The AVR Steering Committee in 2004 highlighted that they were “conscious of the fact that recording technology is changing at rapid pace, particularly in the case of digital technology as applied to audio and video

80. Electronic Recording of Interview Regulations, 1997, regulation 2. The relevant provisions are: Section 30 of the Act of the Offences Against the State Act, 1939; section 4 of the Criminal Justice Act, 1984; section 2 of the Criminal Justice (Drug Trafficking) Act, 1996; section 42 of the Criminal Justice Act 1999; section 50 of the Criminal Justice Act, 2007; and section 16 or 17 of the Criminal Procedure Act 2010.

81. Electronic Recording of Interview Regulations, 1997, regulation 4(3).

82. Electronic Recording of Interview Regulations, 1997, regulation 5.

83. *ibid.*

84. People with intellectual disabilities are over-represented in the Irish prison system, see Gulati, G., Murphy, V., Clarke, A., Delcellier, K., Meagher, D., Kennedy, H., & Dunne, C. P. (2018), ‘Intellectual disability in Irish prisoners: Systematic review of prevalence’, *International Journal of Prisoner Health*, 14(3), 188–196.

85. Where the interviewee is leaving the room or there is an issue with the tape or recording equipment – the interviewer should record that a break is to be taken, the reason for the break, the time, and switch off the equipment, remove the tapes, seal one of the tapes with a master tape label and give it an identification number, sign the tape and ask the interviewee to sign it. (Electronic Recording of Interview Regulations, 1997, regulations 7-10). Then before the interview recommences, the process begins again, from the unwrapping of tapes to the setting up of the equipment. If there is a break where the interviewer and interviewee are remaining in the room, the process is less complicated – the member records that a break is to be taken, the reason, the time, and switches off the equipment. Then before recommencing the interview, the interviewer sets the equipment to record, reminds the interviewee that they have been cautioned and records the time at which the interview recommenced (Regulation 10). At the end of the interview, the interviewer asks whether there is anything the interviewee wishes to say or clarify, reads back the notes and asks if the interviewee wishes to make any alterations or additions, records the time, switches off the equipment, removes the tapes, seals one of the tapes with a master tape label and gives it an identification number and signs it and asks the interviewee to sign it. If the interviewee refuses or is unable to sign the master tape label, the Member in Charge is called to the interview room and asked to sign it (Regulation 12(2)).

86. In a 2003 parliamentary session, the Chairperson of the Committee on Public Accounts questioned why DVD technology had not been adopted and highlighted how in practice “If a person leaves the room, the tape is stopped and a new one put in... In some cases up to 80 tapes can be required.” However the issue persists with DVDs although not to the same extent. Committee of Public Accounts, Special Report No. 5 - Garda Interview Recording Systems, 26 June 2003, <https://www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2003-06-26/3/>.

transmission and recording.”⁸⁷ This practical problem would be overcome by cloud-based solution. This would enable police to upload AVRs of interviews directly to the cloud instead of relying on DVDs. However, the use of cloud-based software would require stringent adherence to the collection and storage provisions of the EU Law Enforcement Directive (LED) in circumstances where the provider might be an external body. Article 28 of the LED requires personal data gathered in a police interview to be processed in a manner that ensures an appropriate level of security and confidentiality. There exists a tension between data protection concerns and requirements and the need for police to keep recordings in case of future proceedings.

Challenge 4. Defence access to tapes

The 1997 Regulations provided that a copy of the tape could be provided to the interviewee or their legal representative via a request in writing.⁸⁸ However, following allegations that these tapes were being played in pubs as a source of entertainment,⁸⁹ and that gangland leaders were requesting the tapes from suspected persons to review them to see if they divulged any sensitive information on the gang,⁹⁰ legislation in 2007 provided that a person could only obtain access to the tape if they were charged with an offence, brought before court, and the court directed that a person or their legal representative could have a copy.⁹¹ The court can specify conditions attached to the granting of the tape to the defence.⁹² If the suspected person is not “charged with an offence”,⁹³ neither they nor their lawyer can receive a copy of the tape. This is a challenge for defence lawyers who must now make a formal cumbersome legal application in court for a tape. It is challenging if their client is not charged as they may want to review tapes for other proceedings but have no way to access them. While issues of gangland intimidation are still an issue, a better balance could be struck between Ireland’s narrow system of furnishing copies and Croatia’s system of automatic furnishing as explored below in section 4.2.1.

Challenge 5. Camera perspective bias

The main camera of the recording equipment is pointing towards the face of the interviewee, whose chair is usually located in the centre of the room. Depending on the camera angle, it is sometimes possible to see part of the lawyer in the frame of the video recording, however not always, as the focus is on the interviewee. Research shows that whoever is in shot appears more guilty and this issue is at play in Ireland given the police have their backs to the camera.⁹⁴

Challenge 6. Transcription

Police officers write contemporaneous notes during the interview in addition to the AVR and sometimes there are discrepancies. It was highlighted in this project’s consultations with a defence lawyer that it can be time consuming to review the video and contrast it with the provided notes. However, it was acknowledged that this also highlights the importance of the availability of an AVR. Irish gardai have noted that “*at the moment the notes mean we are using an antiquated system.*”⁹⁵ Similarly, academics highlighted how: “*It is very difficult for Gardai to get into any flow of questions and answers within the interview because of this, and interviews are likely to be much more effective if the requirement for a contemporaneous note was removed. This also has the effect of substantially lengthening the time an interview takes which means both that the suspect is detained for longer, and that garda time is unnecessarily consumed.*”⁹⁶ This is an issue, which the AVR Steering Committee also examined in 2004. However, they highlighted different arguments in favour of keeping the practice

87. AVR Committee Report 2004, p.12.

88. Electronic Recording of Interview Regulations, 1997, regulation 16.

89. Tony Purcell, ‘Crime lords see garda interview videos’, Irish Examiner, 26 November 2003.

90. Tom Brady ‘Crime suspects can no longer demand tapes of interviews’ Irish Times, 15 February 2007.

91. Criminal Justice Act 2007, section 56.

92. *ibid.*, section 56(1) “only if the court so directs and subject to such conditions (if any) as the court may specify”.

93. *ibid.*

94. See for example Landström, et al, ‘The camera perspective bias: A case study’, 4(3):199 – 208, October 2007, Journal of Investigative Psychology and Offender Profiling.

95. Michelle Hennessy, ‘Gardai recording interviews still have to take written notes, and they say it’s hurting their work’, the Journal.ie, 29 April 2014.

96. Yvonne Daly and Vicky Conway, ‘Regulation of detention in Garda custody, Submission to Law Reform Commission for Fifth Programme of Law Reform’, 2019, p. 6, <https://www.dcu.ie/sites/default/files/lawcentre/pdfs/daly_conway_lrc_submission.pdf>.

of contemporaneous note-taking in recorded interviews, such as the transcription cost and need for the transcript to be checked and certified.⁹⁷ It is not clear whether these arguments in favour of contemporaneous note-taking are as valid in 2021 given technological developments. However, current draft legislation will solve this issue requiring only a written note if the equipment is not available or fails at the beginning of or during an interview.⁹⁸ It is unclear from the draft legislation whether automatic transcription is foreseen.

Challenge 7. Oversight

One professional who was consulted highlighted the concern that not all recordings are watched and that some police may feel comfortable that it is not going to be reviewed. They recommended that “*if we’re going to rely on AVRs, we should conduct dip sampling on it and randomly assess the recordings.*”⁹⁹ AVRs could also be used for training.

Challenge 8. Unavailability of equipment

As noted above, interviews do not have to be recorded if it is not “practicable” or if the equipment is not available or is already in use. While it is a rare occurrence in practice, it is recommended that simple resourcing issues do not hinder AVR and that all garda stations are not only equipped with the proper equipment, but also with enough equipment to facilitate more than one interview at the same time. The current draft legislation could be strengthened by removing the exception for when equipment is unavailable.¹⁰⁰

Challenge 9. What happens before and after camera switched on

As noted above, another important safeguard which AVR can protect is the right to information. However, in Ireland the Notice of Rights is given to suspected or accused persons before they enter the interview room and this process is not recorded audio-visually. There remain concerns about other interactions between police and suspected or accused persons in the lead up to the interview itself, which are not recorded.

Challenge 10. Children who are suspected or accused of crime

Jurisdictions with best practices focusing on children such as Belgium, France, and Estonia provide for AVRs of interviews of children, even when a lawyer is present. Currently the regulations are silent on children in conflict with the law. Children are especially vulnerable to coercive police questioning. In Ireland children are subject to the same general legislative powers of detention and questioning as adults, dependant on the legislation under which they are detained.¹⁰¹ Even when a juvenile’s interview is recorded, there is a risk of a false confession. High profile cases in other jurisdictions highlight the need for additional safeguards for children even when AVR is in place.¹⁰² Some Irish police are given specialised training to interview child who are suspected or accused persons (or victims or witnesses). However, in 2020 only 22 police officers were given this training.¹⁰³ The legislation ought to be amended to state that none of the usual derogations can apply when the person to be questioned is a child. The interplay of all procedural rights comes into sharp focus with children in conflict with the law, the right to have a lawyer is of particular importance for a child suspect.

97. AVR Committee Report 2004, p.11.

98. General Scheme of the Garda Síochána (Powers) Bill 2021, Head 60(2) (this is draft legislation), <[https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)>.

99. ProRPC project consultations.

100. General Scheme of the Garda Síochána (Powers) Bill 2021, Head 60(2) (this is draft legislation), <[https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)>.

101. Children are entitled to have a parent, guardian or other adult present during interview. The Children Act 2001, section 61(1). See Part 6 of the Act generally headed “Treatment of Child Suspects in Garda Síochána Stations” which contains specific provisions relating to the detention of juveniles in Garda Stations.

102. See in the United States *Dassey v. Dittmann*, United States Dist. E. Dist. Wisconsin (No. 14-CV-1310) (12 Aug, 2016) which referred to numerous sources describing how easily false confessions may be obtained from innocent vulnerable children suspected of crime and how children’s confessions in the absence of adult and legal assistance are highly unreliable.

103. Parliamentary Question 447, <<https://justice.ie/en/JELR/Pages/PQ-30-11-2021-477>>.



Promising practices from other EU Member States

Promising practice from Croatia

In Croatia, AVR applies to all interviews, regardless of the age of the suspected or accused person.¹⁰⁴ However it doesn't apply for low-level offences.¹⁰⁵ Given that the majority of criminal offences are of a less serious nature, this is problematic.

However, the Croatian model is stronger than Ireland in numerous respects. First, in terms of the penalties involved if no audio-visually record is made. Since the provisions for AVR in Croatia were established by law, any evidence gathered informally outside of the recording is unlawful and the same goes if the police fail to AVR the questioning. This automatic exclusion of evidence is important and as Ireland's system is governed under regulations not law, it is much weaker in this respect.

In the Croatian system "At the request of the questioned person, the recording can be played immediately after questioning. Corrections, nuances or explanations can be made and recorded. A copy of the recording – free of charge – is provided to the suspected person or the defence lawyer after completion of interview."¹⁰⁶ This automatic replay of the interview is helpful, and the immediate corrections can help in avoiding contention and confusion down the line. The automatic copy provided immediately is also very welcome as the bureaucratic channels which suspected or accused persons have to go through, sometimes without help from their lawyer, to obtain their own videos in Ireland can be a barrier. The procedure in Ireland is that a suspected person's lawyer must make an application before a court for the disclosure of the tape.¹⁰⁷

The implementation of the Directive on access to a lawyer in 2013 in Croatia which spurred the reform in this area highlights clearly the need for Ireland to opt into this Directive.

Promising practice from France

Adequately implemented, AVR can bring a positive change in the attitude of the different parties involved in interviews.

In France, it was observed that with AVR police officers and judges adopt a more respectful attitude towards the suspected person and the lawyer.¹⁰⁸ Lawyers are also more careful knowing that "off the record" comments that are not usually reported in the written minutes will be recorded. Overall, it has a pacifying effect on the parties, as recordings puts an end to disputes in relation to statements made.¹⁰⁹

104. Human Rights House Zagreb, PROCAM, country report Croatia, p.21, available at: <https://www.fairtrials.org/articles/publications/croatia-procedural-rights-observed-by-the-camera/>.

105. Low-level offences are covered by another law which does not provide for AVR. Croatia recognizes two main forms of unlawful conduct: criminal acts ("kazneno djelo") and misdemeanors ("prekršaj"). Misdemeanor refers to a less severe violation of the social values and carries with it lighter sanctions

106. Human Rights House Zagreb, PROCAM, country report Croatia, p.14, <https://www.fairtrials.org/articles/publications/croatia-procedural-rights-observed-by-the-camera/>

107. See above in section 4.1.4, Challenge 4.

108. Fair Trials, PROCAM, Country report France, p.25, <https://www.fairtrials.org/articles/publications/france-procedural-rights-observed-by-the-camera/>.

109. Ibid.



Key takeaways

Gradual steps toward widespread AVR. While AVR is best practice, AR without video would be an important step forward for jurisdictions with no recording in place whatsoever.¹¹⁰

AVR is no a stand-alone safeguard against coercion and abuse. AVR needs to be incorporated into a broader package of other procedural safeguards. If not, there is a danger that it will take precedence over other fair trial rights, such as the right of access to a lawyer. In *Doyle v. Ireland*,¹¹¹ the European Court of Human Rights did not find a violation of the right to a fair trial, because, in its view, AVR of the police interview fulfilled the same purpose as a lawyer present with regard to preventing coercion and ill-treatment by the police.¹¹² This suggests that AVR of a police interview is an equivalent safeguard to the presence of a lawyer, which puts this fundamental protection at risk.¹¹³

This is a slippery slope towards the conclusion that where there is AVR, the presence of a lawyer is not necessary and vice versa. But AVR and the right of access to a lawyer serve different purposes. The first is one type of safeguard against ill-treatment and allows for *ex post facto* verification that procedural rights have been respected. Having a lawyer present prevents police abuse and coercion but also guarantees the respect of all other procedural rights such as the right to silence. AVR cannot replace the right of access to a lawyer without putting all fundamental rights at risk.

AVR should therefore come as part of a wider set of reforms, to ensure, among other, that:

- It supports a movement away from questionings focused on confessions to qualitative interviewing – meaning interviews aimed at understanding the suspected person's viewpoint, perspective, and the context instead of advancing a police theory on an issue.
- Lawyers can use the recordings to ensure that their clients' rights are implemented
- Courts also engage and take the time needed to review recordings where there are disputes as to what happened during a questioning.
- Courts provide for an effective remedy such as exclusion of evidence when coercion or ill-treatment occurred during or outside police questionings.

110. Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, § 176 <<https://interviewingprinciples.com>>.

111. ECtHR, *Doyle v Ireland*, App No 51979/17, 23 May 2019, §

112. *ibid*.

113. See the dissenting Judge in the Irish Supreme Court's judgment *DPP v Barry Doyle* 2017 IESC 1, § 178 where Judge McKechnie strongly makes the point that an AVR is not a substitute for having a lawyer present, "I do not believe that the present safeguards sufficiently address the inequality which now exists in the interview room and which can so threaten the rights being presently discussed. For certain there are other protective measures in place in this jurisdiction which differentiate the present Irish context from, say, the prevailing position in the United States pre-Miranda; I am referring, primarily, to the requirement of audio and video recording of interrogations, and the resulting judicial scrutiny and oversight of the conduct of questioning garda, even if such conduct is rarely - if ever - reviewed at a regulatory level. Even so, I am not convinced that this *ex post facto* supervision is an adequate surrogate for the presence of a solicitor at the interview itself."

