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The Capacious Companion: Law, Lawyers and the Legal on Ethics Advisory Groups

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Abstract

This article asks whether and how law matters in ethics advisory work in the fields of health, medicine and science, and whether it is law or legal knowledge, or both, that matters. Written from the perspective of four law professors, each with first-hand experience of ethics advisory groups, it examines the framing of academic legal expertise on ethics advisory groups and explains why this framing requires ongoing negotiation.

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1 Introduction

One of us knows Professor Herman Nys from the editorial board of this journal, another from the European Group on Ethics in Science and New Technologies on which he served for many years,[1] and all four of us know his diverse and considered publications. Ethics advisory work is one of the topics examined in those publications, including pieces on the creation of Belgium's Advisory Committee on Bioethics,[2] the role of ethics committees in the development of health law[3] and the internal structure of ethics committees.[4] Ethics advisory work is also something in which Professor Nys has been a long-term participant. In 1996, he became a member of Belgium's bioethics committee.[5] He also took part in Belgium's committee for the evaluation of the country's abortion law; first, as a member before later becoming its president.[6] He served, in addition, on the advisory board of the Law and the Human Genome Review,[7] became a consultant on health law to UNESCO's Bioethics Division,[8] and was a three-term member of the European Group on Ethics in Science and New Technologies. Relatedly, for this journal, Professor Nys translated the advice

1 KU Leuven, Department of Public Health and Primary Care, *Prof. Herman Nys reappointed as member of EGE*, available online at gbiomed.kuleuven.be/english/research/50000687/news-new/News_stories/prof-herman-nys-reappointed-as-member-of-ege (accessed 23 October 2025).

2 H. Nys, 'Installation en Belgique du Comité Consultatif de Bioéthique', *Recueil international de législation sanitaire* 47(3) (1996) 433–434.

3 H. Nys, 'De rol van een nationale ethiekcommissie in de ontwikkeling van het gezondheidsrecht (deel 1)', *Acta Hospitalia* 34(2) (1994) 60–62; H. Nys, 'De rol van een nationale ethiekcommissie in de ontwikkeling van het gezondheidsrecht (deel 2)', *Acta Hospitalia* 34(3) (1994) 74–76.

4 H. Nys, 'Ethische commissies. Polarisering of consensus?', *Ethische Perspectieven* 8(2) (1998) 93–94.

5 International Encyclopaedia of Laws, *Herman Nys*, available online at ielaws.com/index.php/herman-nys/ (accessed 23 October 2025).

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

on the legalisation of euthanasia given by the Belgian Advisory Committee on Bioethics, exemplifying his commitment to communication about, not just participation in, ethical deliberation.[9] Moreover, as many readers of this journal will know, Professor Nys did all of this from a base, or core career, as a law professor.[10]

In this article, we draw on these strands of Professor Nys' career. We also draw on our own experience on ethics advisory groups, as well as the reading we have done about such groups and, overall, our sense that more could, and should, be said about ethics advisory groups and the role they play in public life. To be clear, in the article, we speak neither for Professor Nys nor for any of the ethics groups on which we sit or have sat in the past. Instead, the starting point is twofold. First, respect for Professor Nys' contribution to the practice of, communication about, and expert commentary on ethics advisory work: as we signal in the title of the article, in the field of ethics advice, Professor Nys was a capacious companion. Second, doubling down on this theme, we are curious about what it means to be a capacious companion in ethics advisory work when one comes from the discipline of law. Put differently, for us, this 'friendship journal' in honour of Professor Nys is a welcome opportunity to ask: whether, and how, law matters in ethics advisory work, and crucially, whether it is 'the law' or legal ways of working, or both, that matter?

Our curiosity has limits, however. The article does not span the ethics ecosystem — in part because that is not our aim, and in larger part, because it would be a daunting and perhaps ill-considered task. So, for example, although they both attract and warrant critical engagement,[11] we do not examine either university and wider research ethics review, or 'ethics at the bedside' (often more formally known as clinical ethics review). We also do not look at the ways in which private power embeds ethics review; for example, how Meta responded to scandal by blending its self-governance structures with rights-based norms around process and regulation to create an Oversight Board charged with reviewing how the company moderates content on its

9 H. Nys, 'Advice of the Federal Advisory Committee on Bioethics Concerning the Legalisation of Euthanasia', *European Journal of Health Law* 4 (1997) 389–393.

10 *Supra* note 5; KU Leuven — Centre for Biomedical Ethics and Law, *Herman Nys*, available online at gbiomed.kuleuven.be/english/research/50000687/50000697/pcbmer/00015339 (accessed 23 October 2025).

11 *See, e.g.*, M.-A. Jacob and A. Riles, 'The New Bureaucracies of Virtue: An Introduction', *Political and Legal Anthropology Review* 30(2) (2007) 181–191; S.M. Wolf, 'Ethics Committees and Due Process: Nesting Rights in a Community of Caring', *Maryland Law Review* 50 (1991) 798–858.

platforms.[12] Finally, we do not focus explicitly on ethics groups established with a mandate to advise on law reform, i.e., where there is a direct connection between the review and a legal outcome.

To be honest, it is easier to label what we are not looking at in this article than what we are. That said, one description would be 'public ethics' — a term that has been used to capture medico-ethical, bioethical or ethical groups tasked with drawing up policy or advice for use in some way on behalf of the public.[13] In this article, we use the term ethics advisory groups (EAGs), which is too broad but also both plain and clear. We also note that the EAGs informing our discussion are based exclusively in Europe. There are two reasons for this: first, it is the region in which Professor Nys was most expert; and second, the same is true for us.

The article is structured as follows. In Section 2, we survey a cluster of science, medicine and health EAGs found within Europe, grouping them under three different headings. The aim is to paint a picture of the sorts of groups that are the focus of this article. In Section 3, we frame the ways in which law — typically 'the law' — is understood by EAGs that fall within our study group. Section 4 extends the analysis, asking whether 'the legal' would be a more productive frame than 'the law', if the aim is to maximise the benefits that academic legal expertise, in particular, can bring to EAGs. Section 5 summarises and concludes.

2 Overview of Ethics Advisory Groups (EAGs)

In order to establish a concrete context for the analysis to follow, this part of the article provides an overview of different kinds of science, medicine and health EAGs operative in Europe, looking at issues such as remit, authority and composition. EAGs can be categorised in various ways and any categorisation is likely to miss some of the varied range. We adopt a working categorisation based on identifying three different kinds of EAG. These are: first, pan-European, standing EAGs; second, national standing EAGs; and third,

12 D. Joyce, 'Meta's Oversight Board: A Critique', *Melbourne Law School podcast*, episode 17 July 2024, available online at https://law.unimelb.edu.au/centres/iilah/podcast/lectures,-seminars-and-talks (accessed 23 October 2025).

13 J. Montgomery, 'Reflections on the Nature of "Public Ethics"', *Cambridge Quarterly of Healthcare Ethics* 22 (2013) 9–21.

EAGs appointed, usually at a national level to address a specific issue. In looking at these EAGs, we are concerned, among other aspects, with the interplay between the role of 'expertise' and 'representation' on EAGs. Thus, we ask what disciplines are represented as experts and we identify different forms of representation (e.g., political, public and patient interest (PPI) and faith representatives). Our primary interest, however, is to gauge the extent to which academic lawyers — people like us and Professor Nys — are part of EAGs.

2.1 *Pan-European EAGs*

For our purposes, the two most relevant pan-European EAGs are the previously mentioned European Group on Ethics in Science and New Technologies (EGE) and the Steering Committee for Human Rights in the fields of Biomedicine and Health (CDBIO).

Formed in 1991, the EGE serves as an independent advisory body to the European Union Commission in matters relating to science and technology.[14] Its task is to 'identify, define and examine ethical questions raised by developments in sciences and technologies' and to 'provide guidance critical for the development, implementation and monitoring of Union policies or legislation in the form of analyses and recommendations'.[15] The Commission may also consult the EGE on any matter relating to these tasks.[16] The EGE Work Programme, including ethical analyses on the EGE's own initiative, must be agreed with the 'responsible Commission department' within the Directorate-General for Research and Innovation,[17] which must also provide a secretariat for the EGE.[18]

EGE guidance is provided by means of Opinions, which must include recommendations,[19] and Statements, which typically address a more immediate policy need.[20] Transparency is a key requirement and all EGE guidance must be published on the EGE website. Members who vote against or abstain may have a minority opinion annexed together with their names.[21] In the

14 The legal mandate for the current EGE is set out in Commission Decision (EU) 2021/156, C/2021/715 amended by Commission Decision (EU) 2024/1997, C/2024/5091.
15 Commission Decision (EU) 2021/156 Article 2.
16 *Ibid.*, Article 3.
17 *Ibid.*, Article 7(3).
18 *Ibid.*, Article 7(1).
19 *Ibid.*, Article 7(4).
20 *Ibid.*, Article 7(10).
21 *Ibid.*, Article 7(5).

health space, EGE opinions have addressed topics such as genome editing,[22] pandemic preparedness,[23] and new health technologies,[24] while statements have addressed issues such as gene editing and scientific advice during the COVID-19 pandemic.[25]

The EGE currently numbers 11, but it can have a membership of up to 15 'highly qualified and independent experts'[26] who are appointed in a personal capacity following a public call for applications, which must set out the required expertise.[27] Appointment is overseen by an Identification Committee and when selecting members, the responsible Commission department should aim to ensure as far as possible, 'a high level of expertise and pluralism, a geographical and gender balance, as well as a balanced representation of relevant know-how and areas of interest, taking into account the tasks of the EGE'.[28] From these members, the EGE elects a chair and one or two deputy-chairs by simple majority for a duration of up to their time in office.[29]

The current EGE comprises four members with a primarily legal background, six with a primarily ethical background and one (the Chair) who is a political scientist. The EGE does not include representative members.

The CDBIO is established under the Oviedo Convention[30] and operates under the authority of the Committee of Ministers of the Council of Europe. It

22 European Group on Ethics in Science and New Technologies, *Opinion on the Ethics of Genome Editing* (Brussels: Publications Office of the European Union, 2021), available online at https://data.europa.eu/doi/10.2777/659034.

23 European Group on Ethics in Science and New Technologies, *Improving Pandemic Preparedness and Management — Lessons Learned and Ways Forward — Independent Expert Report* (Brussels: Publications Office of the European Union, 2020), available online at https://data.europa.eu/doi/10.2777/370440.

24 European Group on Ethics in Science and New Technologies, *The Ethical Implications of New Health Technologies and Citizen Participation* (Brussels: Publications Office of the European Union, 2016), available online at https://data.europa.eu/doi/10.2872/488735.

25 European Group on Ethics in Science and New Technologies, *COVID-19 Pandemic: Statement on Scientific Advice to European Policy Makers During the COVID-19 Pandemic* (Brussels: Publications Office of the European Union, 2020), available online at https://data.europa.eu/doi/10.2777/854269.

26 Commission Decision (EU) 2021/156, *supra* note 15, recital 7.

27 *Ibid.*, Article 5(1).

28 *Ibid.*, Article 5(5).

29 *Ibid.*, Article 6 as amended by Commission Decision (EU) 2024/1997.

30 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS No. 164, opened for signature on 4 April 1997, Article 32. The original body established was the Steering Committee on Bioethics which was replaced by CDBIO from 1 January 2022.

is tasked with carrying out the functions assigned by the Oviedo Convention,[31] conducting intergovernmental work on human rights protection in biomedicine and health, and advising the Committee on all matters within its competence.[32] More specific tasks include assessing ethical and legal challenges raised by scientific and technological developments and by the evolution of practices in biomedicine and health; and, the further development of the principles laid down in the Oviedo Convention. The CDBIO has produced several guides on biomedical and health topics[33] and its advice has also provided the basis for recommendations by the Committee of Ministers.

Membership of the CDBIO comprises representatives from each of the 46 Member States of the Council of Europe. Governments are invited to designate one or more representatives 'of the highest possible rank' with appropriate expertise in bioethics and 'in particular legal, medical and scientific aspects, including in relation to emerging technologies and to the functioning of their health system, and able to consider these from a human rights perspective'.[34] It is not possible, from the publicly available information, to provide an accurate breakdown of the distribution between different kinds of expertise and representative members on the CDBIO. However, both the current Chair and Vice Chair are lawyers.

2.2 *National EAGs*

Most European states have a standing, national EAG. Space does not permit a review of remit and make-up of all national EAGs[35] and so we focus here on two examples which show the scope for variation in approach.

The Swedish National Council on Medical Ethics (Smer) was established by the Swedish government in 1985 and serves as an advisory board to the government and parliament on ethical issues raised by scientific and technological advances in biomedicine, as well as disseminating knowledge and stimulating

31 These are (a) seeking an interpretation of the Convention by the European Court of Human Rights (Article 29), and (b) re-examining/functions relating to amended of the Convention (Article 32).

32 Terms of Reference of the CDBIO for 2024–2027, CDBIO/INF (2023) 13.

33 See e.g. *Report on the Application of Artificial Intelligence in Healthcare and its Impact on the Patient-Doctor Relationship* (September 2024); *Guide to Children's Participation in Decisions about their Health* (April 2024).

34 Terms of Reference of the CDBIO for 2024–2027, CDBIO/INF (2023) 13.

35 There is limited comparative work in this respect, although see global comparisons in J. Köhler, A.A. Reis and A. Saxena, 'A Survey of National Ethics and Bioethics Committees', *Bulletin of the World Health Organisation* 99(2) (2020) 138–147; and P. Hummel, T. Adam, A. Reis and K. Littler, 'Taking Stock of the Availability and Functions of National Ethics Committees Worldwide', *BMC Medical Ethics* 22 (2021) 56, doi: 10.1186/s12910-021-00614-6.

public debate on ethical issues.[36] Smer is an independent body but is administratively affiliated with the Ministry of Health and Social Affairs which also provides a secretariat. A notable feature of Smer is the way in which it balances expertise and representation. In terms of expertise, membership includes experts in medicine, law and philosophy. Of the current membership of Smer, two of the 11 expert members are lawyers. This comparatively small legal membership reflects a common approach to such committees in Sweden, where expert members of EAGs, including regional EAGs, are more typically drawn from medicine, nursing, psychology, theology and philosophy.

One of the most interesting aspects of Smer is the comparative weight given to representative members. Membership includes a representative of each of the eight major political parties in Sweden. Although this kind of overt political representation is unusual, a review by the Swedish Agency for Public Management (Statskontoret) found that the different perspectives provided by politicians and by experts allowed Smer 'to highlight medical ethics issues through applying a holistic perspective' and that this meant that Smer could provide added value when compared to other organisations.[37]

Our second example is the Nuffield Council on Bioethics which was established in 1991 — a period characterised by a growth of interest in bioethics in the United Kingdom.[38] Unlike the position in many other countries, the Nuffield Council is only partly government funded.[39] In its Strategic Plan 2024–2028, the Council describes its purpose as being to 'identify, analyse and advise on ethical issues in biomedicine and health so that decisions in these areas benefit people and society'.[40] The Council also identifies three priority areas for analysis: reproduction, parenthood and families; the mind and brain; and, the environment and health. Members of the Council are selected on the basis of expertise rather than as representatives of a particular view and an externally-chaired membership committee advises on future membership.[41]

36 *See* https://smer.se/en/about-the-council/ (accessed 23 October 2025).

37 *Analysis of the Swedish National Council on Medical Ethics* (2018), available online at https://www.statskontoret.se/in-english/publications/2018/analysis-of-the-swedish-national-council-on-medical-ethics-201820/, p. 20 (accessed 23 October 2025).

38 R. Chadwick and D. Wilson, 'The Emergence and Development of Bioethics in the UK', *Medical Law Review* 26(2) (2018) 183–201.

39 The Council is funded by the Nuffield Foundation, the Wellcome Trust and the Medical Research Council (with the latter being largely government funded).

40 Nuffield Council on Bioethics, *Making Bioethics Matter: Strategic Direction 2024–2028*, available online at https://cdn.nuffieldbioethics.org/wp-content/uploads/NCOB-5-Year-Strategy-Making-Ethics-Matter-FINAL.pdf (accessed 23 October 2025).

41 *See* https://www.nuffieldbioethics.org/about-us/council-members/ (accessed 23 October 2025).

Of the 14 current members of the Nuffield Council, three are legal academics or practising lawyers.

2.3 *Specialist EAGs*

A specialist EAG may be established to address a specific issue where, for some reason, it is not possible to rely on a standing EAG to provide the necessary advice. A useful example is the Pandemic Ethics Advisory Group (PEAG) established in Ireland during the COVID-19 pandemic. Unlike most European countries, Ireland does not have a standing EAG[42] and when the pandemic began, the only formal source of bioethical advice was the Chief Bioethics Officer in the Department of Health. The PEAG was established as an expert subgroup of the National Public Health Emergency Team (NPHET) COVID-19 and was required to review and answer ethical questions relating to COVID-19 preparedness and to provide expert advice to the NPHET, the Department of Health, the Health Service Executive, and others as appropriate. Within a remarkably short time-frame, the PEAG produced an ethical framework for decision-making in a pandemic and an accompanying guidance document on applicable procedural values for such decision-making[43] as well as three sets of ethical considerations.[44] Membership of the PEAG was multi-disciplinary. The nine members comprised four ethicists, two lawyers, and representatives of a patient group and an older persons' advocacy group and the PEAG was chaired by the Chief Bioethics Officer.

For our purposes in this article, this limited overview shows that there is significant variety in EAGs but that a common theme is that lawyers — and academic lawyers in particular — play a role. This is the case notwithstanding

42 The Irish Council for Bioethics (which was established in 2002) was abolished in 2010 as part of cost-cutting measures: see B. Lyons, 'The Irish Council for Bioethics: An Unaffordable Luxury?', *Cambridge Quarterly of Healthcare Ethics* 21(3) (2012) 375–383. It was initially replaced by a National Advisory Committee on Bioethics to provide ethics advice to the Minister for Health; this in turn was replaced by a Chief Bioethics Officer within the Department of Health, a role that has been vacant since 2022.

43 Department of Health, *Ethical Framework for Decision-making in a Pandemic* (March 2020); Department of Health, *Procedural Values for Decision-making in a Pandemic* (July 2020).

44 Department of Health, *Ethical Considerations for PPE Use by Health Care Workers in a Pandemic* (April 2020); Department of Health, *Ethical Considerations relating to Critical Care in the Context of Covid-19* (April 2020); Department of Health, *Ethical Considerations relating to Long-Term Residential Care Facilities* (June 2020). All documents developed by PEAG are available online at https://www.gov.ie/en/department-of-health/collections/national-public-health-emergency-team-nphet-covid-19-subgroup-pandemic-ethics-advisory-group/ (accessed 23 October 2025).

the fact that the EAG is predominantly ethics-focused with respect to policy problems that are within its remit.

3 The Law in Ethics Advisory Work

Where legal expertise is included in an EAG, the question then arises as to how we should understand the role of law in its work. This requires an examination of both how the law is employed to address policy problems within the Group's remit and the particular role played by the legal expert(s) in this regard. This part of the article looks at these issues.

3.1 *The Role of Law*

The role of law in the work of an EAG may be understood differently depending on the (standing) remit of the Group, as well as what it is expected to achieve in terms of outcomes. Typically, the legal expert brings an understanding of the law which involves taking account of both soft law, such as guidelines, principles, norms and recommendations, and hard law, such as case law and legislation.[45] This is accompanied by an appreciation that key actors and institutions are involved in interpreting and applying the law, such as judges and lawyers, as well as courts and tribunals: increasingly, there is also open acknowledgement of the roles played by actors such as NGOs and CSOs who mobilise with, for and against the law. There is generally, but not always, a recognition that the law should not be seen as monolithic and may vary depending on the legal sub-discipline in question and the restrictions imposed by jurisdictional boundaries. Relatedly, although the detail of national law may interest an EAG operating at the level of the EU or the Council of Europe, typically this would be an interest in having examples of how to do (or not to do) regulation via law, rather than a deep dive into technicalities. This is in addition to accepting that legal interpretation and analysis may vary depending on the fact scenarios presented, as well as how differing legal regimes intersect and impact the particular policy problem at hand.

There is no 'one-size-fits-all' approach to understanding the role of law in ethics advisory work and this may turn on the rationale for establishing the EAG. In some cases, the Group may be long established to deal with both emerging and extant policy problems within a broad remit or it may be otherwise directed to deal with a particular issue at the behest of its institutional or

45 See J. Montgomery, C. Jones and H. Biggs, 'Hidden Law-Making in the Province of Medical Jurisprudence', *Modern Law Review* 77(3) (2014) 343–378.

political sponsors. Yet others are convened for a specific purpose, for example, where a new health policy initiative is proposed; where advice is needed by the sponsor with respect to an aspect of technological or scientific innovation; or where a scandal — facilitated by legal rules or, at a minimum, not prevented by them — has led to calls for reform to the healthcare system. Against this background, it can be helpful to understand the role of law as being embedded in its socio-cultural, institutional and political contexts. Law does not operate in a vacuum or as a stand-alone: it both constitutes and is constituted by such contexts. Seen in this way, a law-in-context approach has the potential to add value to deliberations on the part of an EAG in addressing particular policy problems.[46]

3.2 *Law and the Role of Expertise*

There are several dimensions that need to be considered when examining the role of law and its relationship to expertise and representation in the context of ethics advisory work. First, there is a question as to what sort of legal expertise may be required by an EAG, which in turn may reflect how and why it was established in the first place. For example, lawyers with specialist or generalist expertise may be appointed to such Groups and perform different roles as a result. In relation to those with specialist legal expertise, it may be the case that in-depth knowledge is required to understand how the law is, or conversely is not, working in relation to the policy problem at hand — though in such contexts some EAGs, led by their secretariats, would opt instead for professional legal advice. In relation to those who have been appointed to an EAG that has a specific remit in which they have generalist rather than specific legal expertise, a different skillset may be required. This includes the ability to not only assess how the relevant law is (or not) working in practice, but to also be able to make an informed judgement both as to whether law makes a positive, negative or negligible contribution to the problem at hand, and as to whether any recommendations for (law) reform on the part of an EAG are likely to meet with the approval of its institutional or political sponsors.

Come what may, there will be a need for the legal expert to offer advice on legal issues which are relevant to the EAG's remit in a timely and nimble manner. Indeed, it is our experience of involvement in such Groups that the scope of such advice tends to expand over time, as further investigations highlight gaps in knowledge and new issues emerge for consideration. As a result, a degree of flexibility and indeed preparedness on the part of the legal

46 A.M. Farrell, J. Devereux, I. Karpin and P. Weller, *Health Law: Frameworks and Context* (Cambridge: Cambridge University Press, 2017) pp. 7–10.

expert may be needed in order to embrace this expanded approach. At the same time, it can present difficulties in terms of setting parameters with regard to the additional workload, especially where involvement in the Group is an adjunct to the legal expert's work as a full-time academic. In this regard, the existence of a well-resourced and well-staffed secretariat to the EAG can be invaluable, and indeed necessary, if the desired objectives are to be achieved in line with the Group's mandate.[47] Where the Group's members must commit to writing — typically in a group — in order to produce the Group's public-facing outputs, including policy recommendations, particular tasks will often wend their way to legal experts: from finding the 'right words', to using writing to test the depth of views across the Group.

As demonstrated in Section 2 of this article, the legal expert will find themselves working with a range of other members on an EAG. Some may come from medical, scientific, faith-based, social sciences and humanities backgrounds; others may be there to represent public and patient involvement. It is our experience that there is much to be learned from Group discussions informed by different disciplinary and experiential perspectives; at the same time, collegiate ways of working inevitably take time to fall into place, and as part of this, any legal expert is likely to need a high level of legal literacy — that is, an ability to explain both particular rules and legal forms of regulation, and also defend or critique them, in ways that differ from how one would do this in law-specific settings. As Montgomery puts it, '[e]ngaging in public ethics involves exchanging some disciplinary rigour for the opportunity of influence'.[48] The legal expert also needs to be mindful of the fact that they may need to contend with 'boundary work' dynamics involved in the provision of expertise to address particular policy problems,[49] as well as taking account of the importance attached to 'co-producing' agreed positions regarding recommendations for reform.[50] In our experience, both lived experience of the law amongst fellow Group members as well as the wide sweep of legal

47 Similar issues are faced by legal experts participating in government-sponsored inquiries, see M. Dahlin, 'Bridging Law and Policy: Reflections on Working Inside a Government Inquiry', *Health Law Blog Sweden* (2025), available online at https://healthlawsweden.blogg.lu.se/2025/09/04/bridging-law-and-policy-reflections-on-working-inside-a-government-inquiry/ (accessed 23 October 2025).

48 J. Montgomery, 'Public Ethics and Faith', *Theology* 117(5) (2014) 342–348, at 345.

49 See T.F. Gieryn, 'Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists', *American Sociological Review* 48 (6) (1983) 781–795.

50 On the dynamics of co-production of expert knowledge, *see*, *e.g.*, S. Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (London: Routledge, 2006).

consciousness — not legal knowledge or legal awareness but rather 'the ways in which people experience, understand, and act in relation to law'[51] — means that there is often some degree of jostling around who gets to speak about, and interpret, the role of law in an EAG.

Two examples are offered for consideration here. First, there may be some resistance on the part of other members of an EAG to engage with the law and, at times, there may be challenges as to the value of taking account of the legal context in addressing a particular policy problem. On this view, law is downstream after ethical deliberation, if at all. In such contexts, the legal expert must consider how best to present legal points for debate in ways that lessen potential resistance on the part of other members in the Group. The challenge is substantial: any description of the law must be both accurate and accessible, but also capable of capturing the nuance of law, resisting the temptation to collapse into accounts of law as a red light (a prohibition) or a green one (a permission), or accounts of law that either meld law and justice or sever them.

The opposite situation may also occur whereby the legal expert is positioned by their fellow Group members as being able to do all of the following: advise on any and all legal issues that may arise (akin to a sort of 'general practitioner' of law, which none of us are); explain why the law is not working as it should; and design a legal rule as a panacea on its own for addressing what may in reality be a complex policy problem requiring a multi-pronged approach. In the circumstances, there may be a need for tact, as well as an ability to respectfully test assumptions on the part of other Group members. Indeed, the preferred way forward may be for the legal expert to instead place the emphasis on an ethical framing to address the policy problem, in a way that incorporates relevant law. In line with this, in Section 4, we suggest that EAGs' increasing reference to human rights law, and to international human rights law in particular, has the capacity to ease the challenges that arise from the legal consciousness of non-legal Group members (and potentially amongst different legal experts too). As we explain later, this capacity lies in international human rights law's explicitly dual character as both legal and ethical.

51 L.M. Chua and D Engel, 'Legal Consciousness Reconsidered', *Annual Review of Law and Social Science* 15 (2019) 335–353, at 336: 'legal consciousness … comprises both cognition and behavior, both the ideologies and the practices of people as they navigate their way through situations in which law could play a role'.

3.3 *Law and Questions of Jurisdiction*

It may be the case that the legal expert in the EAG will be called upon to interpret and analyse law not only from the legal jurisdiction with which they are most familiar, but also law from other jurisdictions which are considered relevant to addressing a particular policy problem. This may involve examining how law is positioned in different states or territories as part of a federal constitutional system in a given country. In other cases, it may require an examination of similarities and differences with respect to legal principles in (civil/common) law systems as between different countries.[52] This can present a challenge for legal experts who may have generalist, rather than specialist, comparative knowledge with respect to how other legal jurisdictions view questions of precedent, the role of codified law and the importance assigned to judge-made law. In the circumstances, the legal expert may instead opt to focus on identifying relevant legal principles or applications in practice that could usefully be considered by the EAG. However, aligning expectations in line with this approach may be difficult for lawyers, given their propensity for seeking to understand the minutiae of how specific laws are interpreted and applied in a given context.[53] Nevertheless, their ability to distil key principles drawing on a comparative legal perspective may be important, and indeed necessary, to such deliberations against a background where there is both limited time and resources available to the EAG.

3.4 *Law and Questions of Legitimacy*

The law can operate as a preferred method for enhancing the legitimacy of any recommendations for reform arising from the deliberations of EAG s,[54] particularly where it has a mandate to consider how best to address a policy failure arising in the healthcare sector. Law can be seen as an important tool of legitimation to enhance political credibility and facilitate public trust. Examples of the use of law in this context may include the following: the provision of redress for harm caused to patients and their families arising from healthcare malpractice; the setting of more stringent standards regarding patient safety and the work undertaken by healthcare professionals; the improvement of existing

52 For an overview of the methodological approach taken to the study of comparative law, see M. Siems, *Comparative Law*, 3rd edn. (Cambridge: Cambridge University Press, 2022).

53 On this point, see Dahlin, *supra* note 47.

54 For an overview of the relationship between law and legitimacy, see J. Jackson, 'Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives', *Annual Review of Law and Social Science* 14 (2018) 145–165; K. Yeung and S. Ranchordás, *An Introduction to Law and Regulation: Text and Materials*, 2nd edn. (Cambridge: Cambridge University Press, 2024) 321–355.

judicial mechanisms to oversee, or otherwise respond to, legal challenges to health or scientific decision-making in specified areas; and the facilitation of increased accountability mechanisms in relation to the use of institutional and political powers involving the healthcare system. Nevertheless, there is a need for circumspection in terms of what can be realistically achieved in practice in this regard, and the legal expert is ideally positioned to make this clear as part of their work on EAGs.

3.5 *Law and Ethics: a Symbiotic Relationship*

There will be no surprise that for the final entry in this part of the article we turn to the relationship between law and ethics. Often described as a symbiotic relationship,[55] and sometimes framed as law and morality, it has long been the subject of examination in the academic study of health law and ethics.[56] While the focus has traditionally been on examining how best to facilitate an ethically-principled approach to the doctor-patient relationship, there has also been a greater appreciation over time that law's 'coercive aspects' could be used to facilitate this approach in clinical practice.[57] Indeed, ethical guidance regarding the obligations of healthcare professionals in practice, as well as the operation of other aspects of healthcare delivery, have increasingly become underpinned by law, informed by legal developments in human rights, as well as case law more generally.[58]

So how might this intertwined relationship between law and ethics impact the work of legal experts on EAGs? In our experience, it is a relationship that may become quite blurred or quite fuzzy. As noted previously, this may reflect the rationale for the establishment of an EAG; it may result from the range of expertise represented in the Group; and/or it may turn on the fact that appointed legal experts have an in-depth knowledge of relevant ethical and legal issues as they apply in the scientific, health or medical context. As a result, members of the Group with legal expertise may find themselves being designated as either the legal or the ethics expert, or as having expertise in both. In the context of the latter, this may involve focusing on how an ethically-principled approach may improve existing law to address a particular policy problem under consideration by the EAG. Whatever the combination — ethics or law, ethics and

55 J. Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford: Hart, 2007).

56 A.M. Farrell and E.S. Dove, *Mason and McCall Smith's Law and Medical Ethics*, 12th edn. (Oxford: Oxford University Press, 2023) chapter 1.

57 J. Montgomery, 'Time for a Paradigm Shift: Medical Law in Transition', *Current Legal Problems* 53(1) (2000) 363–408.

58 See generally Farrell and Dove, *supra* note 56.

law, or ethics of law — the legal expert may need to exercise a degree of cognitive flexibility in responding to how the EAG seeks to employ their expertise, while also setting appropriate boundaries as to what might be expected in this regard.[59]

4 The Legal and EAGs

The claim that is crystallising here is that EAGs can be curious places for academic legal experts. To contribute to such Groups as an academic legal expert requires creativity, compromise and close attention to red lines. The conclusions and policy recommendations that emerge from an EAG may be neither nuanced nor neat when viewed exclusively through the lens of law and legal knowledge, and inevitably they are reached from very different, possibly inconsistent, starting points. Furthermore, law isn't always a recognised or acceptable starting point for all Group members.

At times on an EAG, the core question for the academic legal expert is: 'Can I live with it?' This, as we have said, can be a curious spot (even if fellow Group members are experiencing something similar with respect to their own expertise or representative role). It's not akin to how we are encouraged to think, talk and write in either legal academic or legal practice settings. At the same time, no amount of talk about creativity and compromise, or even collegiality as core to EAG work, is going to let us off the hook where either an EAG's majority instinct to exclude the law represents an error of legal consciousness, or a description of the law, in our expert area, is inaccurate. These have to be red lines. Relatedly, creativity, compromise and collegiality cannot be seen as an invitation to be definitive about areas of law that fall outside one's expert area, even if we should always be willing and able to step up with accounts and assessments of the capacities of law more generally in relation to the problem question.

The back and forth can be relentless. This relentlessness goes up a notch when the EAG operates with a strong divide between law and ethics — where 'the law is the law' is the prevailing mindset of the Group. Clearly there is good reason never to assume that the law is ethical; there are plenty of examples of

59 See e.g. J.E. Perry, I.N. Moore, B. Barry, E. Wright Clayton and A.R. Carrico, 'The Ethical Health Lawyer: An Empirical Assessment of Moral Decision Making', *The Journal of Law, Medicine and Ethics* 37(3) (2009) 461–475; J. Montgomery, 'The Compleat Lawyer–Medical Law as Practical Reasoning: Doctrine, Empiricism and Engagement', *Medical Law Review* 20(1) (2012) 8–28.

wicked law being fully enforceable law that contributed to or failed to prevent harm. At the same time, something important about legal knowledge gets lost if EAGs are unwilling or unable to appoint or accommodate academic legal experts who insist on doing more than describing the law as it is. Academic legal experts on EAGs should ideally have a deep knowledge of, and interest in, the ethical values that have influenced particular legislative and judicial choices. They should also have deep knowledge of the role, including the limits, of law as a normative system. Harnessing these forms of legal knowledge, which reach beyond describing current or previous law, can improve the work of EAGs. But being able to harness 'the legal', not just 'the law', requires the EAG acting as a group, as well as the relevant appointments panel, to create space for it and protect it by paying attention to the choices involved.

Two simple moves can help. The first is a move from noun to adjective — from 'the law' to legal knowledge or 'the legal'. This is the move we made in the previous paragraph. The second move institutionalises international human rights law as an EAG reference point or resource.[60] At first glance, the two moves may look inconsistent: the second, with its foregrounding of a form of 'the law', seems likely to counter the first. In practice, the two moves are complementary. More than this, they resist unhelpful severance of law and ethics and, relatedly, of law, ethics and rights.

An EAG that chooses 'the law' over legal knowledge in its broad sense is likely to be dismissive of international human rights law. The latter, as its critics point out, isn't entirely law-like. Its enforcement architecture, for example, has minimal or no 'big stick' capacity. This makes it easy to frame international human rights law as vapid and leaden and to leave it offstage. By contrast, a human rights literate EAG would be open to, and curious about, international human rights law. It would acknowledge, first, that human rights are the closest thing we have to a global ethical discourse on values such as freedom, dignity and welfare; second, that this global ethical discourse has a legal form — namely, international human rights law — to which states have signed up; and third and finally, by taking up international human rights law in general, and perhaps the right to science and the right to health in particular, EAGs could

60 *See also* A. Boggio and R. Yotov, '"Beyond the Moral Appeals of Bioethics": International Human Rights Law as the Basis for the International Governance in the Biomedical Science', in E.S. Dove, V. Rahimzadeh and M.J.S. Beauvais (eds), *Promoting the 'Human' in Law, Policy, and Medicine: Essays in Honour of Bartha Maria Knoppers* (Leiden: Brill/Nijhoff, 2025) pp. 225–251; J. Tobin, 'Medical Interventions for Children Born with Variations in Their Sex Characteristics: What's the Rights Approach?', *Monash Bioethics Review* 39(Suppl. 1) (2021) 567–581.

activate and amplify these rights in ways that help such Groups to negotiate the nature of the problems they are asked to address.[61]

The suggestion then is that by being open to international human rights law — specifically, its dual character as both legal and ethical — we enrich deliberation by EAGs in general and unlock the full potential of academic legal expertise in particular.

5 Conclusion

The influence of law varies from one setting to another; law is also just one of a range of normative systems that shape how humans act. Professor Herman Nys understands this well, as do we. And like Professor Nys, we also understand that in EAG settings, multiple and overlapping normative and other pressures are in play. Furthermore, like Professor Nys, we have particular reason to aim for EAGs in which law is mined to its fullest capacity, rather than being merely 'on top' or 'on tap'. That is why the title of this article invokes 'the capacious companion'; relatedly, it is why the article's core claim is that, on EAGs, 'the legal' should be seen as the capacious companion of 'the law'. It follows that EAGs need legal experts who are at ease crossing the boundary between 'the law' and 'the legal'. Put differently, EAGs need legal experts who are capacious companions.

That said, this article is a preliminary study of the issue not a definitive one. The cluster of EAGs with which we have engaged is small, and the questions we asked were particular. For example, we did not engage with whether modes of appointment, compensation and expenses affect who applies for and who gets appointed to EAGs;[62] whether repeat players are popular choices for such Groups and, if so, with what effects; or whether EAG models from Europe and the wider Global North are being transplanted to the Global South (e.g., as part of international cooperation in science, technology and medicine in which Global North partners and Global North funder expectations take the lead), and with what effects. We also have not tracked whether there is a tipping point at which our proposal, assembled by us as academic legal experts

61 See further T. Murphy, 'Law, Ethics, and the Human Right to Science: Saying What we Mean, and Meaning What we Say', *Frontiers in Sociology* 10 (2025) 1–4.

62 See Montgomery, *supra* note 48, pp. 346–347 noting that although open competitive recruitment against defined competencies is increasingly appealing or expected, the leadership qualities sought for public sector appointment are difficult for some — e.g. those within churches with an interest in ethical issues — to demonstrate.

steeped in particular traditions about rules and how to use them, could make EAGs into legalised or legalistic domains. That to be clear is not what we want.

It is also important to note that in this article we did not ask: how do EAGs understand ethics, ethics experts and the ethical? This question could steer the next steps of research in this area, not least for what it might tell us about this article's concluding claim: namely, that the dual character of international human rights law as both legal and ethical might help to unlock the full potential not just of academic legal expertise on EAGs but of EAGs themselves. The question of how EAGs and their sponsors understand ethics is also important more generally, especially in a climate in which private power in the science and technology sector promotes ethics rather than law as the optimum regulatory choice, and where what counts as an ethical question is both increasing and contested.