

Local variation in governmental guidelines and circulars – Summary

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Informational steering instruments

In this study we focus on the informational steering instruments used by the government to influence the actions of local authorities and ask how these manage to accommodate local variation. We also look at the legal status of the documents; how that status is conveyed; and, not least, how these documents are perceived and deployed in the municipalities. This is the background to the account we provide of what the government sought to achieve in developing these informational steering documents and how these documents are perceived and received in the municipalities.

It is common to refer to these government documents, which include among other things guidelines and circulars, are frequently referred to as informational steering instruments, or “soft law”. They are soft inasmuch as they are neither legally binding nor economically imperative. Nevertheless, they are used by government agencies in their steering of local authorities. When we refer to a guideline or circular without distinguishing between them, we use the term *informational steering document*.

Research questions

Our determination of the degree to which informational steering instruments accommodate local variation is based in part on an analysis of whether these documents were written to showcase opportunities for variation. We investigate whether and the degree to which these documents serve in practice to reduce or expand local authorities’ freedom of action.

The study focuses on central government and municipal stakeholders and explores the background to the creation of a select group of guidelines. We will also be looking at *whether* local authorities or their representatives were involved in the drafting of these guidelines, and if so, what part they played.

Based on our selection of guidelines we then discuss

- The degree to which the contents of the guidelines convey their legal status
- How advice and recommendations are communicated to municipal stakeholders. Does the wording use *shall*, *may* or *should*?
- Do they make specific recommendations in relation to staffing, type of expertise, hours etc.?
- Do the guidelines make clear whether local authorities have a margin of discretion?

To delimit the study, we look at informational steering documents in the policy areas of healthcare, primary/secondary education and municipal planning.

Background to the study

In 1993, the Ministry of Local Government and Regional Development issued a white paper in which it discussed relations between central and local government (St. meld. nr. 23 (1992-93) *Om forholdet mellom staten og kommunene*). The principle of equality and partnership, the Ministry advised, should inform relations between the two levels of government. A subsequent white paper on central and local government, on oversight, auditing and concerted action (St. Meld. nr. 12 (2011-2012) *Stat og kommune – styring og samspel*) lent added weight to the principle. A political objective set out in that white paper is an essential part of the background to our study of informational steering instruments. The white paper states:

Framework management means to accept a certain amount of variation in municipal service delivery. Local conditions and needs vary widely. Therefore, to accommodate and facilitate adaptation to local variation, framework management and local freedom of action will be indispensable. (St. Meld. 12.2011-2012, Section 1)

The question we ask is therefore how and to what extent informational steering instruments enable or constrain the freedom local authorities require to customize different services to different local variations. The reason we ask this question is because of the significant rise in the use of informational instruments in the 2000s.

What is an informational steering instrument?

An informational steering document is per definition not a legally binding instrument. Informational steering documents are written in ways, however, that make them more or less legally binding. For instance, legal obligations can be inferred from the way in which reference is made to the law. A circular whose contents are full of references to the law may be more binding than a guideline which only sporadically refers to the law. It is the *substance* of the document that is more binding, even though the *form* of the “circular” in itself is no more binding than a “guideline”.

It looks as if circulars are used to clarify legal points in close conjunction with the law, and can therefore be as binding as much of the law to which they refer. Guidelines are used, it seems, more informally, precisely to provide guidance in an evidence-based manner rather than to clarify. It is the form of guidance whose purpose is not legal clarification which constitutes the principal focus of this project. We have therefore chosen guidelines as our research subject, not circulars.

The term “guidelines” seems to be used in reference to documents situated somewhere between guidelines and circulars, insofar as they are intended to have binding force on the actions of local authorities. We will return later to two types of guideline, evidence-based guidelines in the healthcare sector, and governmental planning guidelines (formerly national policy guidelines) in the field of planning. We have not had the opportunity to study them in detail, however.

Method

We conducted a three-part analysis.

1. We define what we mean by informational steering instrument, including guidelines, circulars, etc. We also look briefly at the prevalence of what we define as government guidelines and regulars. We link this review to three policy areas, healthcare, education and planning.
2. A vertical study of at least six government guidelines, where at least two deal with each of the policy areas.
3. A normative assessment of how local variation is accommodated in our selection of guidelines.

Intentions and form in a selection of government guidelines

In our review of guidelines in the healthcare, education and planning sectors, we discovered a multitude of government documents called guidelines. The term ‘guideline’ is used differently in the various services. The analysis discusses guidelines in terms of legitimacy, role, degree of

technicality/professionalism, relationship to the wording of the law, and impact on local action alternatives.

- Guidelines legitimacy

Guidelines derive their legitimacy from different sources. One of the selected guidelines, a paper dealing with healthy living centres, is authorized in law. None of the Environment Ministry's guidelines are authorized in law. The Environment Ministry's "guidelines", on the other hand, are legally binding on local authorities and derive their legal force from being endorsed by royal decree. A guidance paper as a thematic paper on universal design obtains its political legitimacy from several different laws and general policy documents, however. The directions set out the papers are well founded in law, but inasmuch as they are issued in the form of a document, their legitimacy is politically derived because promoting universal design is a political objective.

- The role of guidelines

Guidelines communicate their role as non-legally binding instruments on local authorities by being designated *guidelines*. They do not clarify with equal precision how far their status, which they derive from their relationship to laws and regulations, has legal force on local authorities. It was particularly evident in the education sector that guidelines form a hierarchy of sorts. For example, the guidelines issued by the Health Directorate to help municipal officials navigate the regulations when a margin of discretion is involved, are perceived to have the strongest legal force on local authorities, while guidelines issued for the exercise of discretion, such as the guidance paper for elective studies at school and development strategies for public health clinics and school health services only offer advice and suggestions.

It is evident, moreover, in the wording, where *should* and *must* are used more frequently in guidelines on regulatory matters, while *may* is used when the paper deals with administrative judgement calls.

Regarding the role of the individual guidance paper investigated in this analysis, the guidance paper for the healthy living centres can be construed as a paper informing local authorities how to set up and deliver services in one of the areas they have a statutory obligation to provide under the Municipal Health Services Act (aka Health Care Act). It is essentially a paper giving the authorities a rundown of prevention work and what evidence-based prevention actually comprises. Another document we have analyzed, the Development Strategy for Public Health Clinics and School Health Services, is not a guidance paper; it simply provides information on its subject matter.

Other roles are associated with being a guide to regulations, such as the guidance paper on special needs education.

- Guidelines' level of professionalism/technicality

As with subject matter and perspectives, technicality is another variable aspect of the guidelines. This is also true also of guidelines on legal matters. While the healthy living paper emphasizes legality in the sense that the second edition refers more frequently than the first to the laws that legitimize it and which take effect whenever a healthy living centre opens, the paper on special needs education emphasizes legality in the sense of clarifying the substance of the procedural aspects of Chapter 5 of the Primary and Secondary Education Act.

In the case of other guidelines, their technicality lies in facilitating action and providing advice on how to perform different services and other things. The Development Strategy for Public Health Clinics and School Health Service, for example, is merely a technical document aimed at helping public health clinics and school health services develop expertise. It highlights the linkages between the public health clinics and school health services and other municipal services.

Guidelines on school subjects are based on the same idea to an extent; they offer advice on

alternative educational programmes, etc. which can give form and supply content to new subjects introduced by the ten-year Knowledge Promotion Reform.

While the paper for healthy living centres is intended for decision-makers in local councils, that is, the political and administrative authorities, it also offers tangible technical advice and tips for people working in and on the services provided by the centres. Similarly, the guidance paper for special needs education is meant for administrative officers in the local councils, and bases its argumentation on the regulations pursuant to the Education Act. The same can be said, moreover, of most of the guidance material issued for the municipal planning sector. Its purpose is to inform officials about procedures associated with the Planning and Building Act, thus enabling local authorities to adapt procedures to local conditions.

Papers on school subjects are based in their entirety on matters related to teaching, and speak directly to schools and teachers. Insofar as the development strategy for public health clinics and school health services speaks to anyone at the municipal level, its arguments are technical/professional.

- Do guidelines interpret the law or do they simply reproduce the wording?

This question is primarily applicable to guidelines concerned expressly with rules and regulations such as the paper on special needs education and the one on healthy living centres.

The papers on healthy living centres interpret the Health and Care Services Act insofar as they tell local authorities that it is their statutory duty to provide preventive health services and informing them that in setting up a healthy living centre they will be meeting their obligations, and indeed other obligations stemming from the Act. The special needs education paper largely follows the provisions of the Education Act. Both the Act and the specifications set out in the paper are intended to standardize the procedures whereby different local councils allocate special needs education among themselves. The paper does not refer to other possible interpretations of the Act, though the Act itself does provide a margin of discretion, something which a literal reading of the paper might overlook.

- The direct or indirect impact of the guidelines on local action radius

Some of the papers we have seen have clear expectations with regard to expertise, skills, etc. This applies, for instance, to the healthy living centre paper. Development strategies for the healthcare sector carry recommendations on staffing, but since it is done within the parameters of an inquiry, it may have more to do with anticipating the future direction of healthcare policy rather than offering concrete recommendations as such. The staffing recommendations might therefore simply express the functions a centre is expected to provide.

The papers in the fields of planning and school subjects speak much more directly to planners and teachers, but carry no recommendations on staffing, hours etc.

The papers do tell local authorities in some instances that they have a margin of choice. This is particularly common in the field of healthcare, where local councils are free to open a healthy living centre or refrain from doing so. This is not stated explicitly in papers on primary and secondary education if we look at the papers concerning rules and regulations, represented here by the guidance paper on special needs education. But given that it is issued in the form of a guidance paper, an element of local discretion will obtain.

Guidelines in the municipalities: Use, needs and opinions

An important perspective of this analysis concerns the opinions and response of local authorities to the guidelines. Given their status as guides, an important issue in this analysis is related to how the papers are perceived in the municipalities.

In the opinion of the local authorities involved in this study, represented by council leaders, local government officers, middle management officials and frontline staff, the guidelines largely

succeed in spelling out their legal status. Inasmuch as they are issued under the category of guidelines, our local informants do not take them to be legally binding as such. But there are some important exceptions. This is particularly the case with guidelines where the law is the dominant linchpin. In our study, the main example is the special needs education paper. It follows the Education Act and goes directly to procedural matters and administrative discretion rather than dwelling on technical issues and professional judgement. Some local council informants therefore consider the paper to be more binding than papers dealing with, for example, discretionary calls in schools, like the guidance paper on school subjects under the knowledge promotion reform.

As long as what is written in the guidelines complies with laws and regulations, they are perceived to be more legally binding, but also as a means of building capacity in legislation and jurisprudence. Given that laws often leave room for legal and political judgement, several different options may lie concealed in the wording of a provision. This opens a discretionary space for local authorities, who can use it to interpret and decipher the rules and the wording of the guidelines with a view to creating meaningful and effective expedients in the local context. However, it becomes something of a challenge the moment the county governor decides to launch an audit on the basis of the guidelines. This, we found, happened in the case of the guidance paper for special needs education. Local authorities are likely to feel embarrassed and indeed that they are effectively being overruled. This type of action may well constrain freedom of action.

Guidelines can also be experienced as an interpretative directive when they proceed to flesh out directions given in law. An example is when the healthcare legislator requires services provided and delivered by law to be “judicious”. This requirement is a “legal standard” whereby the substance of the law is to be determined by norms outside the law (Prp.91L 2010-2011, pp. 263 ff). It could also become a legal standard, and in turn embedded in guidelines and technical guidelines, as well as the public’s perceptions of values.

To the extent that guidelines are used to convey the substance of legal standards, there will accordingly be room for local variation in line with local values and experiences. These local interpretations or adaptations can prove difficult to oversee and supervise.

Legislators will therefore in many cases allow for a margin of discretion, both legal and political, precisely to facilitate local adaptation. Guidelines could offer a potential solution, but the wording of the law might also permit of other interpretations. To the extent that local authorities lack the requisite expertise, capacity, political determination or anything else in a particular area, they will tend to follow the prescriptions laid out in the paper. The opportunities for creative and adaptive interpretations granted by this legal and political interpretative space, will not be noticed by all local authorities. At the same time, a guidance paper can facilitate local action by highlighting the various options available to local authorities. In that sense, the papers can serve to instigate real action. This does not, however, expand the local sphere of action in relation to laws and regulations.

Although the use and awareness of guidelines vary, to the extent local authorities do in fact use them, their professional and technical standard is considered adequate, we found. This applies to healthcare, but also schools, where the special needs education paper is used locally. Guidelines are also considered to be up to date and evidence-based, containing references local authorities can make use of. In some cases, however, there is little awareness and even less use of the guidelines.

In relation to the guidelines used actively by local authorities in our study, they are largely satisfied with what the papers say and how they say it. Given that many people find guidelines a useful addition professionally, they use them to help them decide among technical and professional options. One reads, in other words, political signals into the priorities set by the guidelines.

When needed, we also found local authorities to be very positive to the information provided by guidelines. But that there exists an urgent need for guidelines was something we did not, however, discover. On the other hand, there is an urgent need for more knowledge in certain areas, and when it comes in the form of a guidance paper, local authorities are particularly grateful. Many local informants, however, evidently have numerous sources of information, including white papers and other policy documents.

Guidelines as an auditing instrument for county authorities

Guidelines may also be used by the county auditing department to monitor whether local councils are fulfilling their statutory duties. Because the law uses approximate and imprecise terms, officials conducting the audit must themselves give the terms meaning. They can do this in various ways. For example, the Ministry of Children and Equality and the National Board of Health prepared a guidance paper on the audit of a trial programme where local councils worked together on delivering care for vulnerable children. The trial was conducted in 114 municipalities in 2008 (Helsetilsynet 2009). Another audit method is the one highlighted in this report concerning local councils' provision of special needs education. Audits were there carried out on the basis of the "Guidance Paper on the Education Act on special educational assistance and special needs education", i.e. the same paper that governs local councils' joint allocation of special education services in which they may exercise discretion.

In general, informational steering documents are not equipped with powers to require local councils to act in a particular way. Councils may therefore use their professional judgement to implement the advice and recommendations contained in the guidelines in light of local conditions. If guidelines for local councils are used in government audits, the county authorities can emphasize, and thus audit, other aspects of guidelines than those local authorities themselves elect to emphasize. Insofar as the county authorities uses guidelines in their auditing procedures, they could end up overruling local discretion. This is a challenge regarding the status and use of guidelines

Local authorities also find it challenging when a service they can provide freely becomes subject to government inspection. This happens when the authorities decide to set up healthy living centres, for example, a preventive measure in their eyes. In retrospect, it turns out that healthy living centres are classified as a health service, and therefore subject to oversight.

What can the government and Norwegian Association of Local and Regional Authorities (KS) do to accommodate local variation in guidelines and the like?

One possible strategy to ensure local variation is addressed is to streamline the terminology surrounding guidelines and circulars. At the moment, documents belonging to different categories according to their classification, acquire a status that does not ensure consistent terminological practice. The categories are not uniform within technical and professional areas, and they are certainly not uniform between them. Stakeholders will consequently have different perceptions of the documents and use their margin of discretion in their interpretation of them. This creates a situation in which different players will have different perceptions of the degree of legal force attached to the different documents. One possible solution could be to excise passages and other matter of a legally binding nature on local authorities and issue it in the form of a circular. This should help give steering documents a clearer legal status.

One could also attempt to make it clear in the introduction that guidelines are not legally binding. In this connection, one could write that the law sets certain limits on the administrative and/or political discretion available to local authorities, but that within this margin, local authorities can act as they see fit. It is also important to make it clear that local variation is desired as long as it adaptations comply with the legal constraints and reflect variations in local priorities or in local conditions.