

NAWAC GUIDELINE 03 [REVOKED]:

Setting minimum standards where section 73(3) applies

1. Introduction

Section 73(3) of the Act provides that NAWAC may, in exceptional circumstances, recommend minimum standards that do not fully meet specified obligations, including the obligation to ensure that the physical, health and behavioural needs of the animal are met or that unreasonable or unnecessary pain or distress may occur. In making such a recommendation NAWAC must have regard to, among other things, the feasibility and practicality of effecting a transition from current practices and any adverse effects that may result from such a transition, and the economic, religious or cultural effects of any transition from current practices to new practices. NAWAC may also consider any other matter that it considers relevant in making the recommendation.

2. Difficulties of forecasting beyond ten years

In applying section 73(3) of the Act, NAWAC notes the difficulties in forecasting beyond a ten-year time frame with regard to:

- (a) what scientific research may establish during the intervening years in relation to the issue being considered;
- (b) the new practices/technologies that may be developed during the intervening years in relation to the issue being considered;
- (c) future external influences, both national and international, which might impede, or accelerate, a change;
- (d) likely economic trends and what impact they might have on the ability for change to occur with regard to the issue being considered; and
- (e) changes in society's ethical values.

Notwithstanding the above, section 78(1) requires NAWAC to review all codes of welfare no later than 10 years after they were issued.

3. Time frame for meeting minimum standards

Given the above forecasting difficulties and legal constraints, NAWAC believes that any recommendation for minimum standards that come into force more than ten years after the code is issued will generally be unwise, and subject to challenge and legal review.

Therefore, in the interests of robustness when drafting codes of welfare NAWAC has decided that:

- (a) it will not recommend minimum standards to come into force more than ten years after a code is issued; and
- (b) it will only recommend minimum standards which take effect either immediately a code is issued or on a specified date during the following ten years before a code is required to be reviewed.

4. Framework for considering whether Sections 73(3) and 73 (4) apply

NAWAC has therefore endorsed the following framework as a guide to how it will handle the process:

- (a) NAWAC will reserve any decision on whether a draft code contains minimum standards that do not fully meet the obligations of the Act until it has received the public submissions relating to the code and considered:
 - the public submissions
 - the writing group's submissions (including those from affected parties)
 - current New Zealand and international research
 - current good practice
 - available technology
 - society's ethical views
 - international practices and trends
 - the feasibility, practicality and economic effects of any change
 - any other relevant matters.
- (b) NAWAC will consider those matters as set out in its decision-making guideline (NAWAC Guideline 10)
- (c) NAWAC recognises that the "exceptional circumstances" provisions impose an onerous test, and therefore place on the Committee a heavy responsibility and a need for caution¹. NAWAC will therefore fully document its reasoning for recommending a section 73(3) exemption.
- (d) In considering whether to invoke section 73(3) NAWAC will carefully consider the requirements of section 73(4):
 - The feasibility and practicality of effecting a transition from current practices to new practices and any adverse effects that may result from such a transition;
 - The requirements of religious practices or cultural practices or both; and
 - The economic effects of any transition from current practices to new practices.

NAWAC recognizes that these factors must be of a very significant magnitude and degree, and must clearly outweigh the adverse welfare effects of non-compliance with the requirements of the Act, in order to satisfy the overriding requirement of "exceptional circumstances".

¹ . The phrase "exceptional circumstances" has been held by the New Zealand Courts, in various other statutory contexts, to denote something "distinctly out of the ordinary", "well outside the normal run of circumstances". It is intended to be a difficult requirement to satisfy. That is especially so in the present statutory context given that, if established, it would permit practices that would otherwise be a serious breach of the Act, illegal, and subject to significant pecuniary and custodial penalties. It is not enough for the Committee merely to show, for example, that there may be difficulties in effecting a transition from current practices to new practices; or that there may be adverse effects resulting from such a transition; or that there may be adverse economic effects. Whenever a new minimum standard is introduced that restricts or prohibits an existing farm practice or system, some practical difficulties, adverse effects, or economic effects will ordinarily occur. There would be nothing exceptional about that. (Gillian Coumbe, submission on Draft Layer Code 2011).

5. Framework for handling the process

NAWAC may decide that a minimum standard, as originally drafted by the writing group, does not fully meet the obligations of the Act. When that occurs, based on NAWAC's analysis of the information before it, four courses of action would be available to NAWAC:

(a) No exceptional circumstances under section 73(3) and (4) apply

When NAWAC considers that it is reasonable to require an immediate change to fully meet the obligations of the Act, NAWAC will rewrite the minimum standard, which would come into force on the date the code is issued.

(b) Exceptional circumstances under section 73(3) and (4) apply

- (i) When NAWAC considers that it is reasonable to require a change to fully meet the obligations of the Act at some stage during the ten years before the code is subject to review, NAWAC will rewrite the minimum standard, which would come into force on a specified date during the ten years from when the code is issued. NAWAC may also set interim steps to be achieved towards meeting those obligations on specified dates before the final date for a change.
- (ii) When NAWAC considers that it is not reasonable to require a change to fully meet the obligations of the Act during the ten years before the code is subject to review, but that interim steps towards those obligations could be set, NAWAC will rewrite the minimum standard to incorporate those interim steps, which would come into force on specified dates during the ten years from when the code is issued. NAWAC will also:
 - signal the future direction towards which NAWAC would like to see progression, based on current knowledge, and subject to welfare standards being met in the future to allow the progression to be made;
 - note that any firm decisions on that progression will be made by NAWAC when it next reviews the code;
 - for the particular issue, note the matters which will require specific consideration as set out in the Act, including current research, good practice and available technology, alternative systems, society's ethical values, international practice and trends, religious/cultural practices, and the feasibility, practicality and economic effects of any change;
 - specify research NAWAC would like to see undertaken before the next review of the code, if it considers that to be appropriate; and
 - indicate an earlier date when NAWAC hopes to review the code based on research being available, if it considers that to be appropriate.
- (iii) When NAWAC considers that it is not reasonable to require a change to fully meet the obligations of the Act during the ten years before the code is subject to review, and that there are no interim steps that can be achieved before the code is subject to review, NAWAC will:

- signal the future direction towards which NAWAC would like to see progression, based on current knowledge, and subject to welfare standards being met in the future to allow the progression to be made;
- note that any firm decisions on that progression will be made by NAWAC when it next reviews the code;
- for the particular issue, note the matters which will require specific consideration as set out in the Act, including current research, good practice and available technology, alternative systems, society's ethical values, international practice and trends, religious/cultural practices, and the feasibility, practicality and economic effects of any change;
- specify research NAWAC would like to see undertaken before the next review of the code, if it considers that to be appropriate; and
- indicate an earlier date when NAWAC hopes to review the code based on research being available, if it considers that to be appropriate.

Notwithstanding the above, NAWAC may choose to review a code at any time within its ten-year life.

This guideline was originally approved by NAWAC on 23 October 2003. It was revoked by NAWAC in February 2016, following changes made by the 2015 Animal Welfare Amendment Act which rendered the guideline redundant. It was used for codes of welfare published prior to May 2015 so is still kept available as a useful resource when referring to those documents.

Please see Guideline 13 for the updated guidance.

This guideline is not a legal interpretation of the Animal Welfare Act 1999.