

From: [Peter McGlone](#)
To: [TPC Enquiry](#); [Armstrong, Claire](#); [Glassick, Helen](#)
Subject: Clarence Draft Local Provisions Schedule
Date: Tuesday, 17 November 2020 12:38:42 PM
Attachments: [Response to CC re Spotted handfish SAP FINAL.doc](#)
[Spotted Handfish SAP Amended 17 Nov 2020 FINAL.docx](#)
[Spotted Handfish habitat - for projecting.docx](#)

Please find attached further submissions in regard to the TCT's proposed Spotted Handfish Special Area Plan:

- Response to the CCC Section 35F Report regarding the Spotted Handfish Special Area Plan;
- Amended Spotted Handfish Special Area Plan.

Also attached is a word document including the SAP map (plus an explanatory table) that we want to have projected at the hearing if that is possible.

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0406 380 545

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From: [Peter McGlone](#)
To: [TPC Enquiry](#)
Subject: Re: Clarence Draft Local Provisions Schedule
Date: Tuesday, 17 November 2020 4:30:54 PM
Attachments: [image003.jpg](#)
[Spotted Handfish SAP Amended 17 Nov 2020 FINAL CORRECTED.docx](#)

The earlier version of the Spotted Handfish SAP had a key error in CLA S23.7 - correction included in red text.

My apologies.

Peter McGlone

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On Tue, 17 Nov 2020 at 16:14, TPC Enquiry <tpc@planning.tas.gov.au> wrote:

Good Afternoon

Thank you for your email.
Your email has been forwarded to the Delegates.

Kind regards



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From: Peter McGlone <peter@tct.org.au>
Sent: Tuesday, 17 November 2020 12:36 PM
To: TPC Enquiry <tpc@planning.tas.gov.au>; Armstrong, Claire <Claire.Armstrong@planning.tas.gov.au>; Glassick, Helen <Helen.Glassick@planning.tas.gov.au>

Subject: Clarence Draft Local Provisions Schedule

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tasmanian conservation trust inc

Tasmanian Planning Commission
tpc@planning.tas.gov.au

17 November 2020

Submission in response to the Clarence City Council's response to the proposed Spotted Handfish Specific Area Plan

On 17 March 2020 the TCT made a submission in response to the Draft Clarence Local Provisions Schedule which essentially involved proposing Spotted Handfish Special Area Plan. On 29 September 2020 the CCC produced the Clarence Draft Local Provisions Schedule Section 35F Report which included responses to the TCT's submission. This submission is provided as a response to the comments by CCC in its section 35F report and to justify the need for a Special Area Plan (SAP) addressing the conservation of spotted handfish. It is noted that a revised Spotted Handfish Specific Area Plan has been provided and is included with this submission. It is noted that a revised Spotted Handfish Specific Area Plan has been provided and is attached to this submission. A revised map of Spotted Handfish habitat is being prepared and we anticipate presenting it to the TPC at the hearing on 18 November 2020.

1. Other legislation is more applicable

Clarence City Council suggests that, as the Spotted Handfish is endangered and other permits might be required to take (i.e. kill) the Handfish under the Tasmanian *Threatened Species Protection Act 1995*, and under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, there is no need for there to be any modification to the LPS to provide any additional protections for this species. They conclude that 'For these reasons protection of the species is not required under LUPAA'.

The TCT's response focuses on identifying the requirements of LUPAA in regard to natural values and specifically the Spotted Handfish. However, we wish to briefly note our disagreement with the Council's assertion that threatened species such as Spotted Handfish are protected under legislation other than LUPAA and 'protection of the species is not required under LUPAA'.

Critically, the Threatened Species Protection Act provides no meaningful protection for habitat and both the Threatened Species Protection Act and EPBC Act address indirect and accumulative impacts poorly. Furthermore, a

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total reliance on these acts could lead to planning approvals which seriously threaten the Spotted Handfish (the Halfmoon Bay RMPAT decision 16/19P responded to such a planning approval) and there is no guarantee that these can be corrected through decisions under other legislation.

Section 32(3)(b) of the *Land Use Planning and Approvals Act 1993* provides that a LPS may contain a Specific Area Plan (SAP) that applies to an area of land (which is defined in section 3 of LUPAA as land covered by water, and water covering land) which modifies or substitutes, a provision, or provisions, of the SPPs. Section 32(4)(b) of LUPAA provides such a SAP may be applied to an area of land which "has particular environmental... qualities that require provisions, that are unique to the area of land, to apply to the land in substitution for, or in addition to, or modification of, the provisions of the SPPs". It is, therefore, clear that Parliament intended that, consistent with the objects of LUPAA, an LPS would ensure that the development and use of land is carried out in a sustainable way, irrespective of whether or not there may be other protections provided for the environment in other legislation. Indeed, so much is acknowledged in the Natural Assets Code of the SPPs, which also provides some protections for threatened species (although not sufficient to protect the Spotted Handfish).

An LPS must further the objectives of LUPAA (section 34(2)(c)). Therefore, the TCT argues that the proposed SAP would "promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity" and "provide for the fair, orderly and sustainable use and development of air, land and water" in protecting the Handfish and its habitat from inappropriate development.

An LPS must also be consistent with state policies (section 32(2)(d) LUPAA). The State Coastal Policy provides at outcome 2.1.4 that "Planning schemes... will provide guidance for ... development in accordance with this Policy." The State Coastal Policy provides the following outcomes that TCT argues support the creation of a SAP to protect Handfish habitat:

1.1.2. The coastal zone will be managed to protect ecological, geomorphological and geological coastal features and aquatic environments of conservation value.

1.1.3. The coastal zone will be managed to conserve the diversity of all native flora and fauna and their habitats, including seagrass and seaweed beds, spawning and breeding areas. Appropriate conservation measures will be adopted for the protection of migratory species and the protection and recovery of rare, vulnerable and endangered species in accordance with this Policy and other relevant Acts and policies.

The habitat of the Spotted Handfish including areas that have substrates used for breeding are clearly 'aquatic environments of conservation value' and 'spawning and breeding areas'. The Spotted Handfish is listed as an endangered species on the Tasmanian Threatened Species Protection Act and critically endangered on the Environment Protection and Biodiversity Conservation Act. Many developments that may be built in the coastal marine environment require permits under LUPAA e.g. jetties, bridges, pipelines etc and have the potential to cause damage to Spotted Handfish habitat and

individual animals. Planning authorities have a responsibility to ensure that developments are appropriately managed to ensure that will not have adverse impacts on Handfish and its habitat.

1.1.10 The design and siting of buildings, engineering works and other infrastructure, including access routes in the coastal zone, will be subject to planning controls to ensure compatibility with natural landscapes.

Some structures, engineering works and infrastructure can if they are appropriately controlled by a planning authority be compatible with retention of natural landscapes including habitat of Spotted Handfish. A planning scheme must be drafted so as to ensure that the unique and critical requirements of Spotted Handfish are taken into account when planning authorities are making decisions.

2.1.1 The coastal zone shall be used and developed in a sustainable manner subject to the objectives, principles and outcomes of this Policy. It is acknowledged that there are conservation reserves and other areas within the coastal zone which will not be available for development.

Some of the Spotted Handfish populations e.g. that at Halfmoon Bay, Opossum Bay and Mary Ann Bay are in conservation reserves that were dedicated specifically for the species. Spotted Handfish habitat within these reserves should not be available for development that in any way damages the spotted handfish and its habitat.

2.1.5. The precautionary principle will be applied to development which may pose serious or irreversible environmental damage to ensure that environmental degradation can be avoided, remedied or mitigated. Development proposals shall include strategies to avoid or mitigate potential adverse environmental effects.

Taking a precautionary approach to the Spotted Handfish is of utmost importance as the species is listed on Australian legislation as critically endangered as there are only 9 known populations and each is small in terms of size of the population and area of habitat.

2.4.3. Any urban and residential development in the coastal zone, future and existing, will be identified through designation of areas in planning schemes consistent with the objectives, principles and outcomes of this Policy.

The designation of Spotted Handfish habitat through the proposed SAP is consistent with the objectives, principles and outcomes of the State Coastal Policy for all the reasons already outlined above. In particular, the critical status and special requirements of the Spotted Handfish justify a specific and targeted approach in designing the Tasmanian Planning Scheme.

2. The proposed SAP areas are outside the municipal boundary

The Council argues that the SAP mapping would be outside of the municipal boundary and therefore be contrary to section 7(b) of LUPAA, which provides that the Tasmanian Planning Scheme may apply to "any part of the sea-shore to the low water mark adjoining its municipal district".

The Council has selectively quoted from section 7 of LUPAA. It provides:

7. Application of Tasmanian Planning Scheme, and exercise by municipalities of powers, in respect of accretions from sea, &c.

A planning scheme and the Tasmanian Planning Scheme may apply to, and a municipality may exercise its powers under this Act in respect of–

- (a) any accretion from the sea, whether natural or unnatural, adjoining its municipal district; and*
- (b) any part of the sea-shore to the low-water mark adjoining its municipal district; and*
- (c) all bridges, jetties, wharves, boat-houses and other structures partly within its municipal district and partly in or over the sea adjacent to its municipal district; and*
- (d) any area of the sea directly adjoining its municipal district in, on, over or under which any use or development is related to, or affects, the use of any adjacent land, subject to [section 11\(3\)\(c\)](#) and [\(d\)](#).*

When reading section 7 of LUPAA in full, the Tasmanian Planning Scheme may apply to and a municipality/council may exercise its power outside the low-water mark adjoining its municipal district providing subsections (a), (c) and/or (d) are met.

If the TPC was concerned that the SAP was too broad in its application, it may amend the SAP (or direct the Council to amend it) to make it clear that the SAP only applies to those developments or uses falling with section 7 of LUPAA, such as bridges, jetties, wharves, pipelines and other accretions from the sea that are partly within, or affecting the use of adjacent land. Proposed wording to this effect has been included in clause CLA-S23.2.1 of the revised draft SAP attached to this submission.

3. Natural Assets Code more appropriate

In its report on representations, the Clarence City Council argues that "The Natural Assets Code specifically caters for the protection and management of threatened (sic) fauna and habitat. In the event that special controls could be applied below the low water mark then it is appropriate that they be implemented through the Natural Assets Code rather than a new SAP designed to manage one species. In this context the planning considerations associated with the Spotted Handfish are no more important than other listed species afforded protection under the Code. However, it is noted that as drafted the Natural Assets Code does not cater very well for underwater habitat, and if ultimately supported at state (sic) level, [the Natural Assets Code] may require some modification to recognise this."

It appears to be Clarence City Council's position that the SPPs should be changed by the State government to better protect underwater habitat, rather

than introduce a SAP to protect the Spotted Handfish. As outlined in section 1, above, LUPAA specifically allows for a SAP to be included in a LPS to provide specific protections for environmental values that are unique to particular areas. Given their critically endangered/endangered status and particular conservation requirements, the Handfish are certainly very unique, and are generally only found the Clarence area. There is no reason to wait for the State Government to change the Natural Assets Code in order to grant these special and unique fish adequate protection under planning laws. Such an approach would not be consistent with the objects of LUPAA, or with the State Coastal Policy. It is uncertain whether any such changes to the Natural Assets Code will ever be accepted and, if they were, that they will be effective in addressing the needs of the spotted handfish.

4. Maps used in the SAP were not subject to public input and expert review

The Clarence City Council argues that because the maps provided by the TCT that form part of the proposed SAP (sourced from the paper Wong et al) were not peer-reviewed and not subject to a public process they should not be implemented in the LPS.

TCT asserts that the process for the approval of a draft LPS is a public process. The TCT's representation is published on the TPC's website and will be the subject of a public hearing. The Council's response to the TCT's representation in this respect provides no legal reason the maps could not be included in a SAP.

The TCT is prepared at the hearing to explain the science underlying the maps used by TCT for the proposed SAP. We have obtained advice from the authors of the Wong et al paper from which the map was obtained.

The CCC points out that the TCT stated in its earlier submission that the Spotted Handfish habitat map was preliminary and that we intend to provide an amended map. The advice we have received makes it clear that the maps show accurately the location of known hotspot areas or primary habitat and as such this will not need to be amended. We have received an email from Dr Tim Lynch from the CSIRO in which he clarifies the status of the areas shown in the Wong et al map. This email can be provided if requested.

The question that we hope to have resolved prior to the hearing is the concern among experts that the map excludes areas of habitat. Some areas not included in the Wong et al map may be thought to be less important or secondary habitat or it may simply be habitat that at the time of the surveys was unoccupied or potential habitat. It is proposed in the SAP use and development performance criteria that a report is to be prepared by an appropriately qualified marine scientist. One option for addressing secondary habitat is to require the marine scientist to undertake surveys of areas identified as secondary habitat (following the DPIPWE June 2020 Guidelines for Natural Values Survey: Estuarine and Marine Development Proposals') to determine the presence or absence of handfish and habitat and to assess its value.

While there is some uncertainty in regard to the secondary or potential Spotted Handfish habitat, for the purposes of regulation of new development and uses in Handfish habitat, it is vital to ensure the proposed planning scheme is consistent with the precautionary principle.

The TCT argues that in considering the SAP and the areas that it should apply to, the TPC should take an approach consistent with the precautionary principles as that is what is required under the State Coastal Policy, which relevantly provides:

2.1.5. The precautionary principle will be applied to development which may pose serious or irreversible environmental damage to ensure that environmental degradation can be avoided, remedied or mitigated. Development proposals shall include strategies to avoid or mitigate potential adverse environmental effects.

Under the State Coastal Policy "precautionary principle" means "where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by: (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and (ii) an assessment of the risk-weighted consequences of various options."

The Wong et al map has been provided to us in GIS format and we can supply this data to the TPC. This will allow the map to be amended to suit the TPC's needs including to remove the Spotted Handfish populations that are located in Hobart and therefore are not within the Clarence municipality.

Given the critically endangered/endangered status of the Spotted Handfish, and their unique reliance on habitat along the coast surround Clarence City Council's municipal area, this is not a circumstance where a lack of scientific certainty around the extent of that habitat would warrant the postponing of measures in the proposed SAP that are clearly designed to prevent serious or irreversible damage to that habitat.

5. CCC criticisms of the drafting of the proposed SAP

Finally, the Clarence City Council makes a number of criticisms in relation to the drafting of the proposed SAP, including that the SAP:

- *contains no Performance Criteria.*
- *prohibits any buildings or works in or adjacent to Handfish habit area. Yet these areas are not defined/mapped and may be outside the area subject to the SAP provisions.*
- *prohibits subdivision, yet subdivision of land below the low water mark has no development impacts associated with establishing title monuments such as boundary pegs and fences ordinarily associated with subdivision. Tenure of the ocean bed need not have any impact on the habitat above or below the water level.*

If the TPC is persuaded that there ought to be specific protections for Handfish Habitat in the LPS, but it is not satisfied with the content of the SAP as suggested by TCT, it is still open for the TPC to:

- modify the SAP itself (section 35K(1)(b) LUPAA); or
- direct the Council to prepare an appropriate SAP (section 35K(1)(a) or (c) LUPAA).

In preparing the Section 35 report for the TPC, it was open to the Council to suggest more appropriate or workable drafting for the SAP. That it failed to do so is no reason for the TPC to outright reject the proposed SAP (or the intent behind the SAP).

The TCT has provided an amended version of the SAP which we believe addresses the Council's concerns and is in the appropriate format. Note that a revised map including primary and secondary habitat is still being prepared and we hope to provide it at the hearing on 18 November 2020.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter McGlone', written in a cursive style.

Peter McGlone
CEO
Tasmanian Conservation Trust

CLA-S23. Spotted Handfish Conservation Specific Area Plan

CLA-S23.1. Plan Purpose

The purpose of the Spotted Handfish Conservation Specific Area Plan is to:

CLA-S23.1.1. Protect and conserve populations of the critically endangered Spotted Handfish.

CLA-S23.1.2. Protect, conserve and enhance the habitat of the Spotted Handfish.

CLA-S23.1.3. To identify and manage potential threats to Spotted Handfish and its habitat.

CLA-S23.1.4. To ensure that developments and uses within the Spotted Handfish habitat only proceed where they are unlikely to have an adverse impact on Spotted Handfish.

CLA-S23.1.5. To guide development and use with Spotted Handfish habitat to ensure that it is sustainable.

CLA S23.2 Application of this Plan

CLA-S23.2.1. The Specific Area Plan applies to any use or development within designated Spotted Handfish habitat to the extent authorised under section 7 of the Act.

CLA-S23.2.2. The provisions of the Specific Area Plan are in addition to the provisions of the Environmental Management Zone and will override those provisions to the extent of any inconsistency.

CLA-S23.2.2. Subdivision is prohibited.

CLA-S23.3. Local Area Objectives

This sub-clause is not used in this Specific Area Plan.

CLA-S23.4. Definition of Terms

In this Specific Area Plan, unless the contrary intention appears:

Terms	Definition
Recovery plan	Means a recovery plan for the Spotted Handfish published by the Department of Primary Industries Parks Water and Environment, or Commonwealth Environment Department (or their equivalent)
Spotted Handfish	Means <i>Brachionichthys hirsutus</i>
Spotted Handfish habitat	Means the area of land designated as Spotted Handfish Habitat in Figure CLA-S23.9 Spotted Handfish Habitat
Suitably qualified person	Means a person with expertise and qualifications in marine ecology.

CLA-S23.5

Use Table

Use Class	Qualification
No Permit Required	
Natural and Cultural Values Management	If no there are no signs or other means of drawing attention to the presence of Spotted Handfish
Passive recreation	If no there are no signs or other means of drawing attention to the presence of Spotted Handfish
Permitted	
Emergency services	If an authority under the <i>National Parks and Reserved Land Regulations 2009</i> is granted by the Managing Authority, or approved by the Director-General of Lands under the <i>Crown Lands Act 1976</i> .
Community Meeting and Entertainment	If an authority under the <i>National Parks and Reserved Land Regulations 2009</i> is granted by the Managing Authority, or approved by the Director-General of Lands under the <i>Crown Lands Act 1976</i> .
Discretionary	
Community Meeting and Entertainment	If not permitted
Emergency services	If not permitted.
Pleasure boat facility	
Research and development	
Sport and recreation	
Tourism operation	
Utilities	
Prohibited	
All other uses	

CLA-S23.6

Use Standards

CLA-23.6.1 Discretionary Uses

Objective:	Discretionary uses must not draw attention to Spotted Handfish habitat and seek to avoid or mitigate potential adverse impacts on Spotted Handfish and their habitat including from noise, physical disturbance, sediments, pollutants, or other emissions.	
Acceptable Solutions	Performance Criteria	
A1 No acceptable solution.	P1 The use must be consistent with the conservation of Spotted Handfish and Spotted Handfish habitat having	

	<p>regard to:</p> <ul style="list-style-type: none"> (a) the Plan Purpose; (b) any recovery plan for the Spotted Handfish; (c) the specific requirements of the use to operate; (d) the location, intensity and scale of the use; (e) the characteristics and type of the use; (f) any emissions and waste produced by the use; (g) the measures to minimise or mitigate impacts; and (h) the storage and handling of goods, materials and waste. (i) a report of a suitably qualified person.
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CLA-S23.7

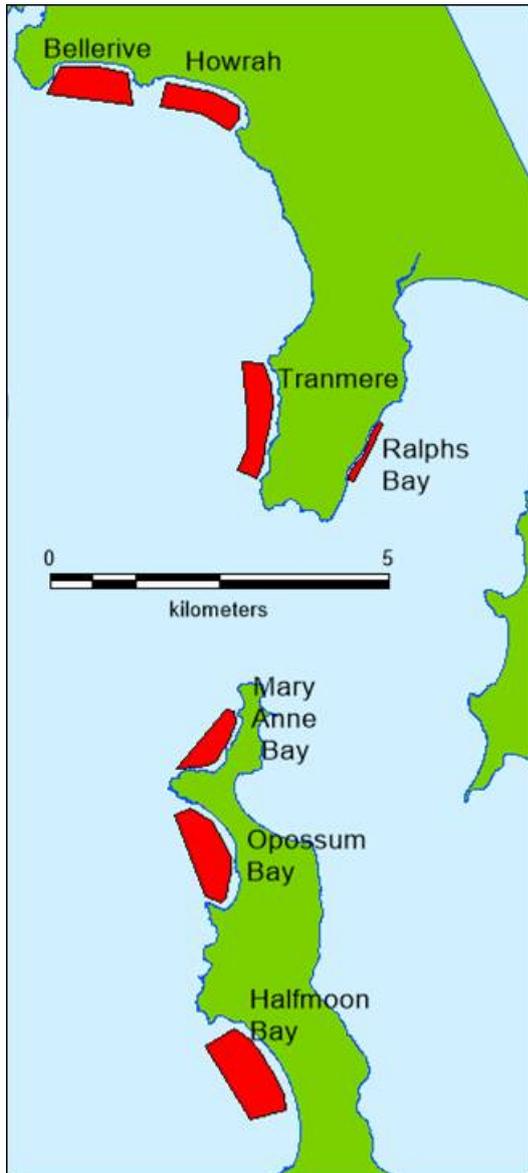
Development Standards for Buildings and Works

CLA-23.7.1

Developments with Spotted Handfish habitat

Objective:	Protect Spotted Handfish and their habitat from direct and indirect impacts from developments including noise, physical disturbance, sediments, pollutants, or other emissions.
Acceptable Solutions	Performance Criteria
A1 No acceptable solutions.	<p>P1 The development must be consistent with the conservation of Spotted Handfish and Spotted Handfish habitat having regard to:</p> <ul style="list-style-type: none"> (a) the Plan Purpose; (b) any recovery plan for the Spotted Handfish; (c) the specific requirements of the use to operate; (d) the location, intensity and scale of the development; (e) the characteristics and type of the development; (f) any emissions and waste produced by the development; (g) the measures to minimise or mitigate impacts; (h) the storage and handling of goods, materials and waste; and (i) a report of a suitably qualified person.

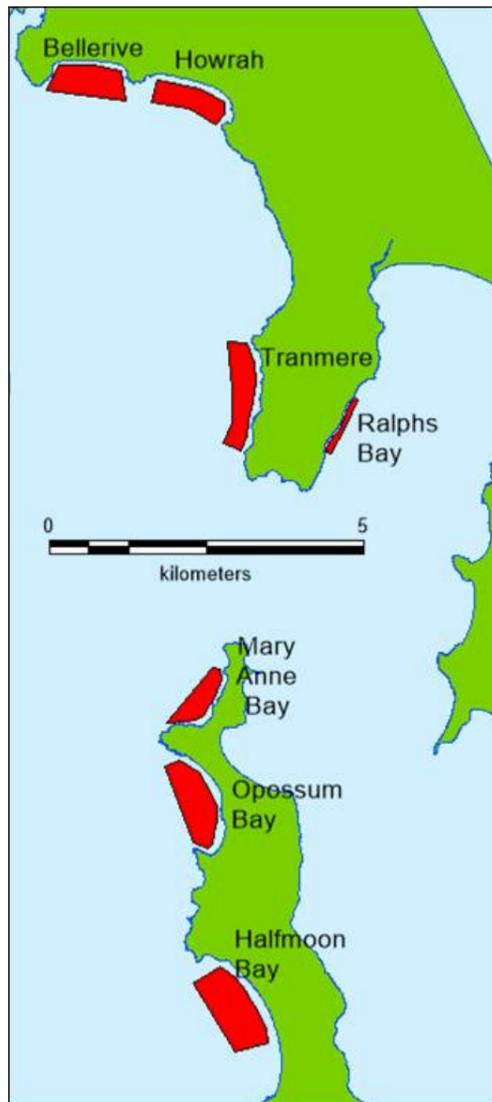
Figure CLA-S23.9 Spotted Handfish Habitat



Key: Red areas are "Primary" Spotted Handfish Habitat. "Secondary" habitat to be included.

Name of Polygon	Municipality	Maximum depth (mean sea Level (MSL), Hobart Chart Datum)	Maximum distance from Mean High Water Mark (MHWM)
Bellerive	Clarence	>10m, <15 m	570 m
Howrah	Clarence	>10m, <15 m	500 m
Tranmere	Clarence	>20 m, <25 m	520 m
Ralphs Bay	Clarence	>5 m, < 10 m	150 m
Mary Anne Bay	Clarence	>15 m, <20 m	490 m
Opossum Bay	Clarence	>10 m, <15 m	690 m
Halfmoon Bay	Clarence	>15 m, <20 m	820 m
Battery Point	Hobart	>20 m, <25 m	480 m
Sandy Bay	Hobart	>10 m, <15 m	

Figure CLA-S23.9 Spotted Handfish Habitat



Key: Red areas are Spotted Handfish Habitat.