

SUBSCRIPTION AGREEMENT

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING OR USING TOTARA SERVICES. BY USING OR PURCHASING TOTARA SERVICES, CUSTOMER AGREES TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY, AND REFERENCES IN THIS AGREEMENT TO “YOU” REFER TO SUCH ENTITY AND ALL INDIVIDUALS ACCESSING TOTARA SERVICES ON BEHALF OF SUCH ENTITY. IF CUSTOMER DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN IT MUST NOT PURCHASE OR USE TOTARA SERVICES.

This Subscription Agreement, including all schedules and appendices attached (“**Agreement**”) is between the purchaser or user of Totara Services (defined below) that accepts the terms of this Agreement (“**Customer**”, “**you**” or “**your**”), and the applicable Totara entity as described below (“**Totara Learning**”). The commencement date of this Agreement (“**Commencement Date**”) is the earlier of the date that Customer signs or accepts this Agreement and the date that Customer uses Totara Services. If Customer’s primary place of business is in North or South America, then “Totara Learning” refers to Totara Learning, Inc. If Customer’s primary place of business is in Europe, the Middle East, or Africa, then “Totara Learning” refers to Totara Learning Europe, Ltd. If Customer’s primary place of business is in any other location, then “Totara Learning” refers to Totara Learning Solutions Ltd.

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires:

Business Day means any day other than a Saturday or Sunday or a statutory public holiday in either New Zealand, the United States, or the United Kingdom, as the case may be, depending on the Totara Learning contracting entity.

Designated Contacts means the individuals designated by you during the purchase process and agreed to by us who are authorised to contact our customer support staff.

Documentation means the documentation for the Totara Software that Totara Learning provides to Customer in conjunction with this Agreement, which may include, but is not limited to:

- manuals, guides and other written material in print or electronic book format;
- videos;
- training slides and material; and
- public or private online documentation in the form of wikis, forums or blogs.

Error means a reproducible defect in the Totara Software when operated on a Supported Environment, which causes the Totara Software not to operate substantially in accordance with our Documentation or as we otherwise intended it to operate, and which is timely reported to Totara Learning as provided herein.

Error Correction means a modification or patch that brings the Totara Software into substantial conformance with our Documentation or Totara Learning’s intended operation of the Totara Software, or a procedure, routine or other information that enables you to avoid the practical adverse effect of an Error.

Force Majeure Event means an event or occurrence which a party could not have reasonably foreseen and taken reasonable measures to prevent, but does not include strikes, lock-outs or any other form of labour dispute or delay caused by contractual or labour relations between the parties and any of their employees, agents, sub-contractors or suppliers, or inability to perform due to lack of available funds.

Intellectual Property Rights means all rights in any jurisdiction in patents, trademarks, trade secrets, copyrights, and other rights of a similar nature, including applications and/or registrations in connection with the foregoing and all other rights with respect thereto anywhere in the world, all rights of priority under international conventions to make such applications and the right to control their prosecution, and all rights under amendments, continuations, divisions and continuations-in-part of such applications; and all rights under corrections, reissues, patents of addition, extensions and renewals of any such grant, registration and/or right.

Non-Production Instance means any instance of the Totara Software that is not a Production Instance.

Maintenance Release means an update to an existing version of the Totara Software containing Error Corrections or minor functionality enhancements. A Maintenance Release is designated as a numbered service pack for the current version, with no change in the version number.

New Version Release means a new version of the Totara Software containing new features or enhancements to functionality. A New Version Release is designated by an increase in the version number. e.g. from 1.5 to 1.6 or 1.0 to 2.0.

Production Instance means an instance of the Totara Software which is deployed to support an active operational learning management business process of the Customer in use by the Customer's personnel.

Second-level Support means the support we provide relating to application issues, but does not include support in the form of code changes. If you are a hosted customer, Second-level Support includes support of the hosted environment.

Subscriber Portal means online user community located at www.totara.community

Subscription Fee means, collectively, the Provisioning Fees and Service Fees specified in Schedule 1.

Subscription Term is defined in Section 2.1.

Supported Environment means a hardware, operating system and database platform meeting the minimum system configuration requirements for the proper use and operation of the Totara Software as set out in our Documentation.

Taxes means any form of taxation, levy, duty, customs fee, charge or impost of whatever nature excluding any taxes based solely on the net income of Totara.

Totara Software means the then-current stable version of Totara Learning Management System (Totara Learn), Totara Social, Totara Perform, Totara Engage and any future Totara application software that Totara Learning makes available to Customers (including through Totara Solution Partners) in connection with the purchase of support and maintenance plans, and any prior version that is still under support pursuant to Totara Learning's Lifecycle policy, but excluding "end-of-life" versions.

Totara Product means Totara Software.

Totara Product Core Components means:

- those core code components of the Totara Software attributable to, and the Intellectual Property Rights of, Totara; and
- excludes any code components attributable to the Moodle product, available from a standard release of Moodle from <http://download.moodle.org/> (or other such successor website), or any other components of the Totara Software contributed or owned by third parties.

Totara Services means the services described in clause 4.1.

Third-level Support means the support provided by us to resolve problems with the application that require changes to the code.

Updates means any releases (including any preproduction releases) of the Totara Software created or made available by Totara Learning, including bug fixes, improvements, enhancements, translations, localizations, new versions or releases, releases on additional operating environments, and other changes to the Totara Software.

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 time is of the essence, in all respects;

1.2.2 a reference to a "person" includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality), and a reference to a "company" includes a person;

1.2.3 reference to "dollars" and "\$" refers to United States dollars (US\$) exclusive of Taxes unless specifically stated otherwise;

1.2.4 the singular includes the plural and vice versa, where the context requires; and

1.2.5 in the event of any conflict between the provisions of the main body of this Agreement and any of the Schedules, then the main body of the Agreement will prevail.

2. TERM

2.1 **Initial Subscription Term:** The initial Subscription Term will begin on the Commencement Date and will run for an initial term of one (1) year, which will thereafter automatically renew for additional one

(1) year terms unless a party provides the other party with a notice of non-renewal at least ninety (90) days prior to the end of the then current term (collectively, the “**Subscription Term**”).

2.2 **Failure to renew:** The failure to renew this Agreement will not affect any rights you may have under the GNU General Public License or other applicable open source software license, but will cease any obligation of Totara Learning to provide updates, maintenance, or support services provided pursuant to this Agreement.

2.3 **Reinstatement of Support:** If you have terminated or elected not to renew this Agreement, you can elect to reinstate support for an existing installation if we still offer support for the Totara Software and if you pay:

2.3.1 the Subscription Fees for the period when you did not receive maintenance; and

2.3.2 the Subscription Fee for the current Subscription Term.

3. **SUBSCRIPTION FEES**

3.1 **Subscription Fees:** On the Commencement Date and annually thereafter on the anniversary of the Commencement Date, you agree to pay to us the Subscription Fees as specified in Schedule 1.

3.2 **Subscription Registration:** As a condition to receiving support, and to ensure proper payment of applicable Subscription Fees, Customer will provide full details of each Production Instance to Totara Learning, including compliance with any technical registration that may be provided for by Totara Learning from time to time.

3.3 **Additional Fees:** Fees for additional services not included under your Subscription Plan or expenses incurred on your behalf will be invoiced monthly at the end of the month in which such services are provided or expenses incurred. Payment will be due on the 20th of the month following the date of the invoice.

3.4 **Costs:** If requested by us, you will reimburse us for all costs (including reasonable legal fees) associated with collecting overdue or dishonoured payments by you that are more than 30 days overdue.

3.5 **Termination:** If payment of fees is more than 30 days overdue, we shall have the option to terminate this Agreement in accordance with clause 10 upon notice in writing to you.

3.6 **Taxes:** Subscription Fees are exclusive of any Taxes. Customer will pay to Totara an amount equal to any Taxes arising from or relating to this Agreement which are paid by or are payable by Totara. If Customer is required under any applicable law or regulation to withhold or deduct any portion of the payments due to Totara, then the sum payable to Totara will be increased by the amount necessary so that Totara receives an amount equal to the sum it would have received had Customer made no withholdings or deductions.

4. **SUBSCRIPTION SERVICES**

4.1 **Services Provided:** During each Subscription Term, we will provide the following support for a single Production Instance of the Totara Software, subject to the terms and conditions of this Agreement:

4.1.1 clarifying and assisting in the operation of the features and functions of the Totara Software;

4.1.2 clarifying our Documentation;

4.1.3 assisting in identifying and verifying the causes of suspected Errors;

4.1.4 providing Error Corrections; and

4.1.5 allowing you access to the Subscriber Portal (where you can access new code releases, latest documentation etc.)

4.2 **Supported Instances:** Except with the prior written consent of Totara, the subscription services set out in clause 4.1 (and any other services under this Agreement) are provided to you in respect of a single Production Instance of the Totara Software. Where you wish to deploy multiple Production Instances of the Totara Software, you will need to sign a separate Totara Subscription Agreement or a Hosting and Support Agreement (as applicable). For the avoidance of doubt, multiple Non-Production Instances may be deployed in connection with a single Production Instance of the Totara Software.

4.3 **Customer as end-user acknowledgment:** You acknowledge and agree that we are providing the subscription services set out in clause 4.1 (and any other services under this Agreement) to you as an end-user and you will not provide any third party with those services, or the benefit (whether direct or indirect) of those services, and whether by way of resupply, resale, on-premise installation, multi-tenancy, or otherwise, and doing so will constitute a material breach of this Agreement and grounds for Totara to terminate this Agreement and the provision of support services.

- 4.4 **Self Help Support Resources:** You agree that the users of the Totara Software under your control must first attempt to answer any questions or resolve any issues in relation to the operation of the Totara Software by using the following self-help resources:
- 4.4.1 the Help function of the Totara Software;
 - 4.4.2 the knowledge-base website located at <https://help.totaralearning.com>; and
 - 4.4.3 community forums and resources located at www.totara.community.
- 4.5 **Contacting Customer Support:** If you are unable to resolve an issue or question in relation to the Totara Software using the self-help resources described in clause 4.4, or, if applicable, the Designated Contacts may contact one of our customer support representatives for Second-level Support to receive support in accordance with your Support Plan. The online support portal is located at <http://support.totaralearning.com>.
- 4.5.1 You acknowledge that:
 - 4.6.1.1 we will provide support only in the English language and only to the Designated Contacts;
 - 4.6.1.2 any communication between the Designated Contacts and a customer support representative must be in English; and
 - 4.6.1.3 we will not provide support to end users of the Totara Software or to any person other than the Designated Contacts.
- 4.6 **Notification of Error:** When you report an Error to us you must include a detailed description of the Error — in order for us to be able to replicate the Error — along with the severity level determined in accordance with clause 4.8. When we receive notice of an Error, we will assign a problem tracking number to be included in all correspondence between you and us and we will provide a response in accordance with the severity levels and response times identified in clause 4.8.
- 4.7 **Error Correction:** We will use commercially reasonable efforts to provide an Error Correction. The Error Correction may:
- 4.7.1 require that you install the latest Maintenance Release for the supported version of the Totara Software on which you reported the Error;
 - 4.7.2 require multiple contacts and off-line research;
 - 4.7.3 when completed, be provided in the form of a Totara Software patch consisting of sufficient programming and operating instructions to implement the Error Correction, which will be provided to you via email, download or other electronic means.
- 4.8 **Response Times:** Our response to an Error depends on the severity of the Error and the level of support purchased by you, as set out in Schedule 1. For each level of severity, our customer support representatives will use commercially reasonable efforts to respond, during the support hours, within the times set out in Schedules 1 and 2. The response time is calculated from the time we receive notice of the Error from you until we contact the Designated Contact reporting the Error to begin resolution efforts, not the time to deliver an Error Correction.
- 4.9 **Exclusions from Support Program:** We are not responsible or liable for providing support in connection with causes external to the Totara Software, including:
- 4.9.1 your failure to incorporate Maintenance Releases or New Version Releases;
 - 4.9.2 installation of the Totara Software or any New Version Releases by any party other than Totara Learning;
 - 4.9.3 your use of the Totara Software with any software or hardware other than within the Supported Environment;
 - 4.9.4 modifications, alterations, or additions to the Totara Software by parties other than us (including modifications, alterations, or additions to the Totara Software made by you);
 - 4.9.5 damage from any source other than us including water, humidity, fire, power surges, computer viruses, and accidents; and
 - 4.9.6 errors arising out of or related to a database management server or a web server or any other third party component that is used in conjunction with the Totara Software (unless we are hosting the Totara Software at our data centre).
- 4.10 **Services due to excluded clauses:** If we agree to undertake any maintenance or services required to fix an Error caused by (in our sole opinion) one or more of the causes specified in clause 4.9 these will be billed to you on a time-and-materials basis in accordance with our then current rates. We are under no obligation to agree to undertake such services at any time.
- 4.11 **Further exclusions:** Support provided under this Agreement excludes:
- 4.11.1 Totara Software installation, configuration or services provided on-site at your location;
 - 4.11.2 problems or errors in modifications to the Totara Software provided by third parties.

- 4.12 **Data protection:** Totara will:
- 4.12.1 only process any personal information received from you:
 - 4.13.1.1 for the purpose of carrying out its obligations under this Agreement and no other purpose;
 - 4.13.1.2 in accordance with any instructions issued by you from time to time; and
 - 4.13.1.3 otherwise in accordance with relevant privacy laws; and
 - 4.12.2 will promptly comply with any request from you requiring it to amend, transfer or delete the personal information.

5. YOUR RESPONSIBILITIES

- 5.1 **Supported Environment and Operations:** You are responsible for undertaking the proper supervision, control and management of your use of the Totara Software including:
- 5.1.1 providing, maintaining and assuring proper configuration of the Supported Environment;
 - 5.1.2 following industry standard procedures for the security of data, accuracy of input and output, and back-up plans, including restart and recovery in the event of hardware or software error or malfunction; and
 - 5.1.3 maintaining a procedure external to the Totara Software for reconstruction of lost or altered files, data and programs. This sub-clause will not apply to you if we are hosting the Totara Software at our data centre.
- 5.2 **Assistance in Providing Support:** You must provide reasonable assistance to us in determining and resolving Errors you report. This assistance may include:
- 5.2.1 determination activities such as performing network traces, capturing error messages, collecting configuration information and other similar activities to allow us to reproduce the Error; and
 - 5.2.2 resolution activities such as access to your personnel and/or remote access to the Supported Environment.
- 5.3 **Implementation of Error Corrections:** You are responsible for performing activities to implement Error Corrections we provide and for responding in a timely manner to requests for information by our customer support staff. Error Corrections may include changing, installing or reinstalling new or existing versions of web browser software or new components, or modifying processes.
- 5.4 **Designation of Designated Contacts:** You will designate up to the number of individuals specified in Schedule 1 of this Agreement as the Designated Contacts for receiving support under this Agreement and you will notify customer support of the Designated Contacts. You may change the Designated Contacts by notifying customer support, but you must not have more than the number of Designated Contacts specified in Schedule 1 at any one time. For continuity purposes, we request that you retain the same Designated Contacts for at least 90 days, unless they are no longer part of your organisation.
- 5.5 **Training:** In order to maximise the benefit of the services we provide and to help speed case resolution, all Designated Contacts are requested to complete basic training on the Totara Software using the self-paced courses available on www.totara.community. You are responsible for proper training of the Designated Contacts and all other appropriate personnel in the operation and use of the Totara Software and the Supported Environment.

6. NEW RELEASES OF THE SOFTWARE

- 6.1 **Maintenance Releases Provided with Support:** We will provide to you any Maintenance Releases and New Version Releases that we make generally available to end users during the Subscription Term at no additional charge. Any Maintenance Releases or New Version Releases are part of the Totara Software and subject to the terms and conditions of this Agreement. The designation of a Totara Software release as a Maintenance Release or a New Version Release will be made by us in our reasonable discretion.
- 6.2 **Maintenance Release Installation:**
- 6.2.1 We may designate a Maintenance Release as mandatory and may require a mandatory Maintenance Release to be applied as a pre-requisite for problem verification, diagnosis and/or resolution.
 - 6.2.2 Once a mandatory Maintenance Release is made generally available, it must be applied to the environment within six (6) months or within such shorter time period as may be designated

by us. After such period, all subsequent Maintenance Releases will be built on a codeline that assumes the mandatory Maintenance Release has been applied.

6.3 **Support of Prior Releases:** We will provide support for the most current Maintenance Releases made in relation to the current New Version Release and the last two New Version Releases immediately preceding that release.

6.4 **Installation of New Releases:**

6.4.1 Unless we are hosting the Totara Software at our data centre, support excludes the installation or configuration of any Maintenance Releases or New Version Releases.

6.4.2 We will not correct Errors arising out of or related to installation or configuration of the Totara Software or any New Version Releases by any party other than Totara Learning.

6.5 **Migration of Customisations and/or Modifications:** For customisation and/or modifications:

6.5.1 We provide support only for the out-of-the-box, unmodified Totara Software (including any standard configuration changes);

6.5.2 All errors must be reproduced by us on such Totara Software before a patch or other fix will be considered;

6.5.3 If you have customised and/or modified Totara Software, support does not include migrating your customisations and/or modifications to any Maintenance Release or New Version Release, unless otherwise provided under a Statement of Work under which we support such customisations and/or modifications.

7. LICENCE AND INTELLECTUAL PROPERTY RIGHTS OWNERSHIP

7.1 **Open Source Software.** Customer acknowledges that the Totara Software and certain other software and materials are provided to Customer under the terms of the GNU General Public License and/or another open source software license that may be provided along with such software, and the terms of the applicable license govern the use of such materials. Accordingly, any commitments, limitations, or restrictions with respect to the use and exploitation of such materials provided in this Agreement are solely with respect to and conditions of Customer's right to receive support and other related services under this Agreement, and nothing in this Agreement shall be deemed or interpreted to conflict with, negate, contradict, condition, limit, restrict, or otherwise diminish any rights Customer may have under the applicable license.

7.2 **Totara Intellectual Property Rights:** No right or licence, express or implied, is granted to the Customer under this Agreement for the use of any Totara trademark, logo, service mark or other Intellectual Property Rights whether or not derived from the Totara Product including, without limitation, the distribution of any Totara Product Core Components or other Totara Intellectual Property Rights.

7.3 **Pre Existing Intellectual Property Rights:** All Intellectual Property Rights that are owned by, or is proprietary to, a party to this Agreement at the Commencement Date of this Agreement, shall at all times remain owned by that party exclusively.

8. PRIVACY AND DATA PROTECTION

8.1 **Scope:** This Section 8 applies to the extent the parties Process Personal Data subject to EU Data Protection Law in the context of this Agreement.

8.2 **Definitions:**

8.2.1 The terms "Controller", "Data Subject", "Personal Data", "Processor", and "Processing" have the meaning given to these terms in the EU General Data Protection Regulation 2016/679 (as amended and replaced from time to time) ("GDPR").

8.2.2 "EU Data Protection Law" means the GDPR and the e-Privacy Directive 2002/58/EC (as amended by Directive 2009/136/EC, and as amended and replaced from time to time) and their national implementing legislations; the Swiss Federal Data Protection Act (as amended and replaced from time to time); the UK Data Protection Act (as amended and replaced from time to time); and the Data Protection Acts of the EEA countries (as amended and replaced from time to time).

8.3 **Roles of the parties:** With regard to the Processing of Personal Data in the context of the Agreement, the parties acknowledge and confirm that (1) neither party acts as a Processor on behalf of the other party; (2) each party is an independent Controller; and (3) this Agreement does not create a joint-Controllership or a Controller-Processor relationship between the parties. The parties acknowledge

and agree that the scope of each party's role as independent Controller is limited to the Processing of Personal Data for each party's own Processing purposes in the context of the Agreement.

8.4 **Obligations of the parties:** Each Party confirms and warrants that, in relation to the Processing of Personal Data for its own Processing purposes, including any Personal Data disclosures to the other party, it acts as a Controller and it complies with EU Data Protection Law, in particular by:

8.4.1 Relying on a valid legal ground under EU Data Protection Law for the Processing of Personal Data, including obtaining Data Subjects' appropriate consent if required or appropriate under EU Data Protection Law.

8.4.2 Providing appropriate notice to the Data Subjects regarding the Processing of their Personal Data, in a timely manner and at the minimum with the elements required under EU Data Protection Law.

8.4.3 Responding to Data Subjects' requests to exercise their rights to their Personal Data, if and as required under EU Data Protection Law.

8.4.4 Transferring Personal Data abroad only in accordance with EU Data Protection Law. In case the United Kingdom withdraws from the EU, the Parties agree to cooperate in good faith to ensure that international transfers of Personal Data in the context of the Agreement continue to comply with EU Data Protection Law.

9. WARRANTY AND DISCLAIMERS

9.1 We will provide the services under this Agreement with the level of due care and diligence that might be expected from a provider of product maintenance and support services in respect of open source software.

9.2 As the Totara Product contains and constitutes open source software, no representations or warranties are made by Totara Learning in respect of the Totara Product, Documentation or any covered works in this Agreement.

9.3 **Disclaimers:** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW ALL OTHER WARRANTIES AND REPRESENTATIONS NOT EXPRESSLY STATED IN THIS AGREEMENT ARE EXCLUDED, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. WE DO NOT GUARANTEE THAT THE USE OF THE TOTARA PRODUCT AND THE SERVICES PROVIDED UNDER THIS AGREEMENT WILL NOT BE INTERRUPTED OR ERROR FREE.

10. TERMINATION

10.1 **Termination for breach:** A party shall be in default of this Agreement where:

10.1.1 it breaches, or fails to properly or promptly perform, any of its obligations (other than payment obligations) under this Agreement, and fails to remedy that failure within 20 Business Days after receiving written notice (inclusive of the date of receipt) from the other party requiring the failure to be remedied;

10.1.2 it breaches a material obligation under this Agreement which is incapable of remedy;

10.1.3 it assigns, transfers or otherwise disposes of any right, interest, obligation or liability in contravention of this Agreement;

10.1.4 it is subject to an Insolvency Event; or

10.1.5 any monies due to be paid by the party pursuant to this Agreement are more than 30 days overdue.

10.2 **Right to terminate on default:** The non-defaulting party may terminate this Agreement immediately by written notice to the other if the other is in default as specified in clause 10.1.

10.3 **Termination or limitation of services for abuse of support:** At our sole discretion, we may terminate this Agreement, or limit the availability of product maintenance services, upon written notice to you, if, in our reasonable judgment, you are abusing the product support system. By way of example, and not by way of limitation, such abuse may include excessive requests for assistance unrelated to errors in the Totara Product or lack of cooperation with the reasonable requests of our personnel for error documentation.

10.4 **Force Majeure:** If a Force Majeure Event under clause 13 continues for more than 60 consecutive Business Days, or for an aggregate of 60 Business Days in any six month period, then the party not claiming the benefit of the Force Majeure Event will be entitled to terminate this Agreement.

11. EFFECT OF TERMINATION:

- 11.1 **Effect of Termination by Us:** If we terminate this Agreement because you are in default, we will retain any Subscription Fees paid.
- 11.2 **Effect of Termination by You:** If you terminate this Agreement because we are in default, our sole and exclusive obligation will be to promptly refund that portion of the Service Fee actually paid by you that is proportional to the percentage of the Subscription Term remaining at the time termination is effective.
- 11.3 **Effect of Termination on use of Totara Product:** The termination of this Agreement will not affect your rights under the GPL to use Totara Product, but will cease any updates, maintenance or support services provided under this Agreement.
- 11.4 **Obligations shall cease:** Subject to clauses 11.1 and 11.2, upon termination of this Agreement all further obligations of both of us under this Agreement will immediately cease, provided that:
- 11.4.1 neither party will be prevented from pursuing other remedies available including injunctive relief; and
- 11.4.2 any rights and remedies of either party in relation to any breach of this Agreement occurring prior to the date of termination, or any rights of either party which have accrued prior to, or which arise out of or in connection with, such termination will not be prejudiced.

12. INDEMNITY; LIMITATIONS ON LIABILITY

- 12.1 **Your Indemnity:** You shall indemnify, defend and hold us and our officers, directors, agents and employees harmless from and against all claims, suits, demands, actions, proceedings, judgments, penalties, damages, losses, liabilities, costs and expenses (including, without limitation, reasonable legal and expert witness fees) resulting from any and all third-party claims against us arising from or relating to:
- 12.1.1 any breach of a representation, warranty, acts or omission made by you; and
- 12.1.2 any action or inaction by you or any of your contractors, agents or employees which caused or is alleged to have caused damage to the person or property of a third-party, including without limitation, third-party computer equipment.
- 12.2 **Mitigation:** Each of the parties must take reasonable steps to mitigate any claim for loss or damage it may take against the other under or arising out of this Agreement.
- 12.3 **Cap:** Except in the case of fraud or wilful concealment, the maximum aggregate liability of either Party under this Agreement shall not exceed the greater of:
- 12.3.1 one thousand dollars (\$1,000US\$); or
- 12.3.2 the fees or commission, if any, received by such party from the other party for the twelve (12) month period preceding the occurrence of such liability.
- 12.4 **Exclusion of indirect losses:** In no event shall either Party be liable to the other for any indirect, consequential or special losses or damages (exemplary or otherwise) arising out of or in connection with the performance or non-performance of its obligations under this Agreement.
- 12.5 **Exclusions for each party:** Except in respect of any obligation of confidentiality, in no event will the measure of damages against any party for any breach of this Agreement, negligence or other action or contravention of any statute or law include, or be derived from:
- 12.5.1 any breach of this Agreement to the extent that the breach is attributable to the prior default, negligence, misconduct or breach of the other party, its employees, or agents;
- 12.5.2 any amounts for any indirect, consequential or punitive damages of any parties, including third parties; or
- 12.5.3 a Force Majeure Event.

13. FORCE MAJEURE

- 13.1 **Obligations suspended:** Where either of us are unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation under this Agreement and:
- 13.1.1 that party gives the other party immediate written notice of the nature and expected duration of, and the obligation affected by, the Force Majeure Event; and
- 13.1.2 that party uses all reasonable endeavours to:
- 12.1.2.1 mitigate the effects of the Force Majeure Event on that party's obligations under this Agreement; and

12.1.2.2 perform that party's obligations under this Agreement despite the Force Majeure Event, then that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance.

14. DISPUTE RESOLUTION

14.1 **Dispute:** If any dispute arises between the parties out of or in connection with this Agreement (**Dispute**), either party may, by written notice to the other party, summon a meeting of the parties to the Dispute. The party claiming a Dispute shall, in its written notice to the other party, designate as its representative to attend the meeting a person with authority to settle the Dispute. The party who receives such written notice shall give notice to the other party in writing within five Business Days of receipt designating as its representative to attend the meeting a person with similar authority.

14.2 **Negotiation:** The persons designated as authorised representatives shall meet promptly as many times as necessary to discuss the matter and to negotiate in good faith to resolve the Dispute.

14.3 **Mediation:** If the Dispute is not resolved by the authorised representatives within 15 Business Days of a written notice first being given by one party to the other pursuant to clause 14.1, the Dispute shall be referred to the mediation of a single mediator. The referral to mediation shall be commenced by a party serving written notice on the other party or parties to the Dispute stating in full the subject matter and details of the Dispute, and requiring the Dispute to be referred to a mediator to be appointed by agreement between the parties. Failing agreement within five Business Days after, and exclusive of, the date of service of the written notice, the mediator shall be appointed at the request of a party by the President for the time being of the Wellington branch of the New Zealand Law Society. The guidelines that shall govern the mediation shall be set by the parties. Failing agreement on the guidelines within five Business Days after the appointment of the mediator, a party may request the mediator to set the guidelines that shall govern the mediation. The parties agree to then submit to the mediation and to act in good faith in that mediation in attempting to resolve the Dispute.

15. NOTICES

15.1 **Service:** Every notice or other communication given under or in connection with this Agreement will be in writing and addressed to the relevant party and delivered, posted by pre-paid registered mail, sent by electronic means (commonly known as email) to the address, or email address of that party. In the case of the Customer, that shall be the address or email address advised at the time Customer registered for support with Totara Learning (or such other address as may be updated through our online Customer portal thereafter). Any notice to us shall be addressed to Totara Learning Solutions Limited, Level 8, 150 Willis Street, PO Box 24552, Wellington 6011, New Zealand or via email to subscriptions@totaralearning.com.

15.2 **Receipt:** Every notice or other communication sent by prepaid letter will be deemed to have been received when delivered personally or three days after it has been put into the post.

15.3 **Electronic communications:** In the case of electronic transmission by email, a notice or other communication will be deemed to have been received at the time specified in the email transmission which was not returned as undeliverable or as containing any error.

16. GENERAL

16.1 **Assignment:** We may assign our rights or obligations under this Agreement, upon giving notice to you. You may only assign your rights or obligations under this Agreement, with our prior written consent (which may be given in our absolute discretion). Any change in control or of more than 50% shareholding in you (if you are a company) shall be deemed an assignment.

16.2 **Compliance with laws:** Each of us will, in performing our respective obligations under and in connection with this Agreement, comply with all relevant statutes and other laws.

16.3 **Entire Agreement:** Subject to any amendment in accordance with clause 15.4, this Agreement constitutes the entire agreement, understanding and arrangement (express and implied) between both of us relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding and arrangement relating thereto, whether written or oral. Any provision in

any statute or other law that is inconsistent with this Agreement will not apply, to the extent that contracting out of that provision is permitted.

16.4 **Variations:** We may amend this Agreement at any time by giving you 30 days' notice of any proposed change and posting an amended version at <http://subscribe.totarams.com>. If you do not accept the proposed amendments, you may terminate this Agreement by notice in writing at any time within the 30 days prior to the change coming into effect. If we do not receive notice of termination from you prior to the change coming into effect, you will be deemed to have accepted the amended Agreement.

16.5 **Pay own costs:** Except as otherwise provided in this Agreement, each of us will pay our own costs of, and incidental to, the negotiation, preparation, execution and enforcing, or attempting to enforce, this Agreement.

16.6 **Non-solicitation:** You agree that you will not during the term of this Agreement or for a period of one (1) year from the termination or end of this Agreement, whether for yourself or for any other person, solicit or approach and entice or endeavour to entice away any of our staff or Totara Solution Partners.

16.7 **No waiver by action:** Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement will not operate as a waiver of such right, power or remedy.

16.8 **Waiver to be in writing:** The waiver of any breach of any provision of this Agreement will not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

16.9 **Governing Law and Jurisdiction:** The laws governing this Agreement, and the jurisdiction and processes for resolving disputes arising hereunder will depend on which Totara Learning entity is executing this Agreement, as follows:

16.9.1 If the Totara Learning entity that is a party to this Agreement is Totara Learning Solutions Ltd. (New Zealand), then this Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of New Zealand and the Parties irrevocably submit to the exclusive jurisdiction of the courts of New Zealand with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. To the extent Customer is not subject to the jurisdiction of the courts of New Zealand, the Parties agree that disputes arising under this Agreement will be resolved by binding arbitration in English in Wellington or Auckland, New Zealand, before a single arbitrator agreed on between the Parties, or failing agreement within 5 Business Days of any Party's first suggestion for a suitable arbitrator, by the President for the time being of the New Zealand Law Society (or his or her nominee), in accordance with the provisions of the Arbitration Act 1996 other than the provisions of clauses 3(1)(a), 5(1)(a) and 7 of Schedule 2 to the Arbitration Act 1996, and any award rendered thereon by the arbitrator shall be final, and judgment thereon may be entered in any court of competent jurisdiction.

16.9.2 If the Totara Learning entity that is a party to this Agreement is Totara Learning Europe Ltd. (U.K.), then this Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of England and the Parties irrevocably submit to the exclusive jurisdiction of the courts of England with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. To the extent Customer is not subject to the jurisdiction of the courts of England, the Parties agree that disputes arising under this Agreement will be resolved by binding arbitration in English in London, before a single arbitrator, in accordance with the rules of the London Court of Arbitration, and any award rendered thereon by the arbitrator shall be final, and judgment thereon may be entered in any court of competent jurisdiction.

16.9.3 If the Totara Learning entity that is a party to this Agreement is Totara Learning, Inc. (U.S.), then this Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of the United States and the State of California, and the Parties irrevocably submit to the exclusive jurisdiction of the courts located in the Northern District of California with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. To the extent Customer is not subject to the jurisdiction of such courts, the Parties agree that disputes arising under this Agreement will be resolved by binding arbitration in English in Santa Clara County, California, before a single arbitrator, in accordance with the rules of the American Arbitration Association ("AAA"), and

any award rendered thereon by the arbitrator shall be final, and judgment thereon may be entered in any court of competent jurisdiction.

SCHEDULE 1

Support Plans and Fees

During each Subscription Term, we will provide the following support and services, subject to the terms and conditions of this Agreement:

- clarifying and assisting in the operation of the features and functions of the Totara Software;
- clarifying our Documentation;
- assisting in identifying and verifying the causes of suspected Errors;
- providing Error Corrections;
- access to the Subscriber Portal; and
- new releases of the Software.

Plan	Professional 500	Enterprise 3K	Enterprise 10K	Enterprise 50K	Enterprise 250K
Number of active users	< 500	< 3,000	< 10,000	< 50,000	< 250,000
Issue reporting	Online Ticketing Desk	Online Ticketing Desk	Online Ticketing Desk	Online Ticketing Desk	Online Ticketing Desk
Designated Subscriber Contacts#	N/A	2	3	4	5
Incident Response Time	N/A	1 Business Day	6 hours or less	6 hours or less	6 hours or less
Annual Provisioning Fee	\$2,900	\$4,700	\$9,500	\$19,000	\$28,500
+ Annual Service Fee	\$600	\$1,000	\$2,000	\$4,000	\$6,000
= Total Annual Subscription Fee: (All prices in \$USD)	\$3,500	\$5,700	\$11,500	\$23,000	\$34,500

- refers to the number of designated contacts from the Subscriber enabled in the Subscriber Portal.

Note: “Active users” in the table above refers to those users who are registered and have logged into Totara Software during the Subscription Term, and do not include those users who have previously registered and/or hold training records but have not logged into the System during the Subscription Term or users who have never logged in.

Escalation Process

Totara Learning Solutions is committed to delivering high-quality products, services and support to our enterprise customers and partners. In the event that you need to escalate a case, our senior technical staff is made available to help you quickly bring your issue to closure.

You can request an administrative escalation at any time if you:

- are not receiving the service you expect from Totara Support;
- have concerns about the progress on a particular case or set of cases; or
- want to provide direct feedback about Totara Support to our management team.

What is the process for escalating my case?

The entry point into the Totara escalation process is by contacting Totara via subscriptions@totaralearning.com or +64 4 385 8399. When connected, please ask for the Duty Manager. The Duty Manager is responsible for evaluating your situation, and acting as an advocate on your behalf.

Have any relevant case numbers available to help us quickly identify the issue. Advise the Duty Manager of the situation including what actions you feel are required from Totara, production dates or deadlines that may be adversely affected, and any other anticipated business impact if the case is not promptly resolved. The Duty Manager is empowered to make a judgment on next steps. The role of the Duty Manager in the escalation process is:

- Owns the problem and the overall action plan. Is responsible for ascertaining the business impact of the situation, based on the information you provide;
- Your advocate during the escalation process;
- Is responsible for customer satisfaction;
- Obtains additional resources, as needed;
- Obtains your approval for the action plan;
- Works to ensure that all parties are properly informed throughout the escalation
- Assigned support engineers to develop, document, communicate and coordinate the technical action plan;
- Identifies need for additional technical assistance; and
- Ensures solutions and workarounds are delivered in a timely manner.

An escalation will be considered closed if it meets one or more of the following requirements:

1. The initially agreed upon objectives have been achieved;
2. A satisfactory monitoring period has elapsed without problem recurrence;
3. The escalation has been reviewed and agreement reached to downgrade the case severity level; or
4. You have agreed that the issue is resolved.

As part of our continuous improvement process, your escalation will be documented and reviewed to help Totara determine the steps that led up to the escalation and how recurrence can be eliminated.

Hours of Availability

Support services are made available at the following times:

- Support is made available from 8:00AM to 6:00 PM Pacific US time, 8:00AM to 6:00 PM Eastern, 8:00 AM to 6:PM UK time, 8:00 AM to 6:00 PM Australian Eastern time, 8:00 AM to 6:00 PM New Zealand time, Monday through Friday, excluding national and local holidays.

Common Features of all Subscription levels

- TotaraLMS – full access to all features
- Open Source – License is GNU GPL v3
- Service Packs / Patch Updates
- Issue Reporting
- Subscriber Discussion Forums
- Documentation and Knowledge Base
- Web-based Administrator / Configuration Training (self-paced)
- Web-based Course Creator Training (self-paced)

SCHEDULE 2

Response times

As per Clause 5.2 you must provide reasonable assistance to us in determining and resolving Errors you report. This assistance may include:

Determination activities such as performing network traces, capturing error messages, collecting configuration information and other similar activities to allow us to reproduce the Error; and

Resolution activities such as access to your personnel and/or remote access to the Supported Environment.

Severity Level	Severity Level Description	Response Time Targets	
		Professional	Enterprise
Severity 1	Inability to use any major functions of the Totara Software, resulting in a critical impact on the User.	Time to respond is 1 Business Day.	Time to respond is 6 hours, during extended support hours.
Severity 2	An important existing functionality is not available and there is not an acceptable workaround. (E.g., a course cannot be published or a previously published course is otherwise unavailable, or an administrator menu feature is not available.)	Time to respond is 1 Business Day.	Time to respond is 6 hours, during extended support hours.
Severity 3	Incorrect behaviour of the Totara Software. E.g. a cosmetic problem, applicable help files or an important existing functionality is not available but there is an acceptable workaround.	Time to respond is 5 Business Days.	Time to respond is 5 Business Days.