# FOLA's RESPONSE TO LSO's TRIBUNAL COMMITTEE REGARDING RULES OF PRACTICE

Submitted to: The Law Society Tribunal Committee
Law Society of Ontario
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The Federation of Ontario Law Associations ("FOLA") thanks the Tribunal Committee for the opportunity to make submissions on this important issue regarding Rules of Practice.

By way of background, FOLA's membership is composed of the presidents of the 46 local law associations (plus the Toronto Lawyers' Association), represented in every judicial district in Ontario. These local law associations collectively represent nearly 12,000 lawyers who are in private practice in firms across Ontario. These lawyers and our member associations are on the front-lines of the justice system. FOLA advocates for a better justice system that recognizes the crucial role competent and professional lawyers play in that system.

FOLA recognizes that the new draft rules are the culmination of the committee's 18 months of intensive work from April 2017 to the present and thanks the Law Society of Ontario and the committee for their hard work.

The current Rules have been in place since 2009 and as per the report to Convocation (May 2018), a draft has been prepared to the Rules of Practice and Procedure.

The stated goals of the "new" Rules are to:

1. better reflect the Tribunal's values of proportionality, accessibility, fairness;
2. better accommodate vulnerable witnesses and those with mental health issues;
3. be more user friendly and flexible
4. be clearer and more understandable, using plain language;
5. be more uniform and less repetitive; and
6. allow for greater use of written processes, active adjudication and technology.

In general terms the proposed Rules appear to provide an approach to achieve these goals. They provide definitions of the values that will guide procedural decisions, greater case management powers and methods of hearing, greater use of written hearings and technology, greater flexibility on the admission of evidence and an update of the rule that deals with not public proceedings and documents. It is expected that these Rules will provide a modernized approach and reduce delay with greater case management and the use of technology.

Upon initial review, we have some concerns about the proposed changes with respect to evidentiary issues. The current Rules provide that the rules of evidence at civil proceedings apply to many Tribunal hearings. The new proposal contemplates the application of s.15 of the Statutory Powers Procedure Act which allows a tribunal to admit any testimony or documents that are relevant unless privileged. It is suggested that this change will not necessarily lead to the automatic introduction of evidence that would be excluded in a civil court. It is suggested that the standard of proof and quality of evidence will not change and that the evidence must be "sufficiently clear, cogent and convincing".

Our concern rests with the apparent reduction in the evidentiary standards to be implemented. The Tribunal will primarily be dealing with disciplinary hearings and it is of great concern that a licensee's ability to practice could be placed in jeopardy on the basis of evidence admitted which would not be ordinarily admitted in a civil proceeding. Although the committee suggests that the change to the rules

of evidence would provide greater flexibility, eliminate technical arguments and permit alternative processes for the admission of evidence, we are of the view that accommodations exist within the existing laws of evidence to address these issues. In addition, it appears that some effort has been made to suggest that this will not represent a marked departure from the current approach which begs the question: Why is this change being proposed? Finally, it is understood that the mandate of the Tribunal is to protect the public; however, the process must ensure fairness to all parties and in particular to licensees facing this process. The case law that has developed regarding the rules of evidence are generally well understood and there does not seem to be any compelling reason to move from evidence that would be admitted in a civil proceeding to a lower standard.

It is noted that the discipline committees of the health professions as well as the Professional Engineers and Architects continue to apply the civil rules of evidence and it seems out of character that the law profession would lower its evidentiary requirements.

The only issue that does not appear to have been considered is the concept of allowing a licensee to plead no-contest. This idea would create a procedure where, with leave of the Tribunal, a licensee could enter a plea of no contest as is the case with other regulatory bodies. This would cover situations where the lawyer or paralegal is content to lose their license or accept some other form of discipline but does not want to admit to any wrongdoing and it does not create any prejudice for the Law Society of Ontario (for example, an undertaking is given not to apply for reinstatement). It is also of benefit to a disciplined lawyer or paralegal in the event that there are other proceedings (criminal and/or civil). It is suggested that this would allow for an early and efficient resolution and eliminate the expense of a full proceeding.

All of which is respectfully submitted.