

Implications of Publishing Legal Information in a Small Island State: Privacy v Open Justice

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Abstract. The power of modern Internet search engines means that anything published online, anywhere in the world, can be at our fingertips in a fraction of a second. This has serious implications for a small island jurisdiction wishing to make its case law available online. This paper will examine the strategic aims of the Jersey Legal Information Board (JLIB) and explain how it has addressed the challenge of publishing the reasoned judgments of the court online while safeguarding the interests of the individual, how it contributes to the integration of the criminal and civil justice systems, and why Jersey's government considers the JLIB website www.jerseylaw.je important for the economy. The paper will conclude with an examination of how government funding has shaped the choice of content and how the economic value of the website is likely to influence future funding models.

Keywords: Jersey, small island state, information governance, open justice, privacy, government sponsorship.

1. Background

Jersey is the largest of the Channel Islands, with a population of 90,000. The Island covers an area of 45 square miles, is 100 miles south of the English coast and 14 miles from France. Jersey is a British Crown Dependency, but is neither a colony nor a dominion. It is not represented in the United Kingdom parliament and UK legislation applies to Jersey only if the Island expressly agrees that it should do so. The Island has its own legal system and courts of law.

The Jersey Legal Information Board (JLIB) was established in 1999 under the chairmanship of the Island's Chief Justice. As a direct provider of legal information, JLIB is almost unique in being a government sponsored agency. JLIB was incorporated under a Law passed by the States Assembly in 2004, and its Vision is for Jersey's legal system "to be, and be recognised as, the global best for a small jurisdiction".

Historically, JLIB has played a major role in ensuring that the Island's legal materials have been made available online to Jersey's legal profession and to prospective investors and regulators worldwide. More recently, there has been a strategic shift towards making the law more widely and freely accessible to all, and to support this process, JLIB joined the Free Access to Law Movement¹ in 2008.

The Jersey Legal Information Board's strategy is based on the following elements:

¹ See *Montreal Declaration on Free Access to Law*
http://www.worldlii.org/worldlii/declaration/montreal_en.html.

- To make the law and legal processes more accessible.
- To promote the better co-ordination of Jersey's justice system.
- To support Jersey's position as a leading business centre.

Each one of these strategic aims is examined separately below.

2. To make the law and legal processes more accessible

As a small island jurisdiction, Jersey wrestles with the problem of balancing public interest and open justice with the privacy of the individual.

“In a free society public access to the conduct of the courts and the results of deliberations in the courts is a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice. The publication of findings of guilt are of value in and of themselves.”²

Although the concept of open justice can be traced back in most European jurisdictions to the 19th century, it has been tempered and balanced thus:

“... the pragmatic reasons supporting the need for public access ... are typically balanced against the pragmatic reasons supporting the need to restrict public access (for example ... protecting the rights of individuals to privacy).”³

The principle of open justice should be regarded as being of constitutional significance. In the past, when judgments remained in “practical obscurity”⁴, that is published in hard copy and available in a limited way but relatively unknown to the majority of the public, there were few privacy issues (the effort required to extract them exceeded the desire to view them). The judgments were distributed to lawyers in hard copy form (for a fee); they were not filed in the public library but were available to the public on request. However, once they were published on the Internet, *Googling* a name became a pastime for the idle or inquisitive. The Jersey Legal Information Board (JLIB) has received several complaints from people who committed serious offences as young adults, were sent to prison, but now 10 or 12 years later are trying to get their lives back on track. They feel haunted by the publication of judgments which can be read by prospective employers, people who would like to settle old scores, or people they meet in the street. This is especially significant to a small island population.

Neither the Data Protection Law nor the Rehabilitation of Offenders Law in Jersey restrict the publication (in full) of judgments on the JLIB website. However, it would not be unreasonable to apply a process of redaction (or “pseudonymisation”) to protect the identity of victims and witnesses involved in criminal cases. Such a process of anonymisation needs to ensure that the resultant anonymised information does not have the properties that can facilitate data linkage and lead to re-identification. Furthermore, safeguards should be in place to prohibit any attempt at re-identification, possibly as a condition of use of the data.

² Spigelman, J.J. (2005), *The Principle of Open Justice: A Comparative Perspective*, Lawlink NSW.

³ Winn, P.A., *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, Washington Law Review, vol. 79, pp. 307-330.

⁴ Sudbeck, L.E. (2006), *Placing Court Records Online: Balancing the Public and Private Interests*, The Justice System Journal, vol. 27, no. 3, pp. 268-285.

JLIB has addressed these and other issues associated with being a small community, by working with the courts, the Children's Service and the Data Protection Commissioner⁵ to agree a protocol for when a judgment should be redacted or indeed retained in a restricted area of the website to which access is limited to the legal profession and the judiciary. These include:

- Criminal cases involving under-18s – redacted.
- Criminal case victims and witnesses – redacted.
- Trust cases involving minors – redacted.
- Sexual assault case victims – redacted and restricted access.
- Public Law Children cases – redacted and restricted access.
- Adoption cases – redacted and restricted access.

Statute law already prevents the identification of victims of sexual assault, under-18s in criminal or public law children proceedings, and adopted children. The above protocol therefore reflects and exceeds existing statutory requirements.

There are rare occasions where a judgment, on the direction of the judge, is not published within the restricted area of the website, due to the fact that it is too sensitive to be placed on the website without redaction, but if redacted would lose its meaning (for example, where a sexual assault is committed by a parent or relative on a member of his or her family). In this case the judgment would not be published at all, and anyone beyond the parties concerned who wanted a copy would have to apply to the Court with a reason. However, the Court has made it clear that, wherever possible, adult defendants in criminal cases should be named in the judgment.

In Jersey, the reasoned judgments of the courts as handed down are referred to as unreported judgments. Since 1985, the formal, reported case law has been published in the Jersey Law Reports; these are the edited and indexed series of selected judgments (produced by a commercial publisher, Law Reports International) concerning matters of lasting legal importance, and produced mainly for the use of practitioners. Prior to 1985, the formal law reports appeared in a series known as the Jersey Judgments.

Once an unreported judgment is redacted, any corresponding Jersey Law Report or Jersey Judgment will also be redacted (a protocol which has been applied to the full series of online reports from 1985 to the current day). The Jersey Judgments are progressively being converted from hard copy and placed online, current coverage running from 1970 to 1984. The unreported judgments from that period were distributed to the legal profession in hard copy only, without any redaction. The Criminal Justice (Anonymity in Sexual Offences) (Jersey) Law 2002 made it an offence to name the victims of sexual assault in judgments. Consequently, the further back the Jersey Judgments and unreported judgments go, the greater the problems of privacy and the greater the need for redaction before online publication.

Going back to that era, it is possible to find names, addresses, ages, schools, and many other personal details which would identify victims and witnesses. In civil matters, particularly divorce and ensuing maintenance disputes, the judgments could be quite specific in relation to some of the more lurid details. The children referred to in those cases (now adults and many still in Jersey) are entitled to privacy, and some of the most colourful cases, where there is no longer a point of law to be gleaned, will

⁵ The Freedom of Information (Jersey) Law 2011 appoints the Data Protection Commissioner to fulfil the role of Information Commissioner also.

not appear online at all. However, the corresponding hard copy Jersey Judgments are out in the public domain (including the public library) without being redacted. Therefore there has to be close cooperation between the publishers and JLIB to ensure that whatever redactions and withdrawals are made within the unreported judgments are reflected in the online Jersey Judgments series.

Even with these protocols in place, there is the potential for tension between legal concepts that appear to be in opposition to one another; for example Freedom of Information and Data Protection, or Human Rights and Rehabilitation of Offenders. The current Data Protection Law came into force in 2005 and made Jersey fully compliant with EU⁶ data protection requirements. The Freedom of Information code of practice came into operation in 2000 and, after many false starts, a draft law was proposed in 2010 and has been passed, but with no timetable for bringing it into force at present. However, as all data held by JLIB is already in the public arena (save the exemptions referred to above) any potential problem for JLIB may lie in individuals taking objections to the Data Protection Commissioner on the basis of the Data Protection Law rather than the Freedom of Information Law.

The European Convention on Human Rights was embodied in Jersey's domestic law under the Human Rights (Jersey) Law 2000. Balancing of interests involves determining which right is predominant in particular circumstances. For example, rights and freedoms guaranteed under the Convention as embodied in Article 10 (Freedom of expression) are sometimes at odds with Article 8 (Right to respect for private and family life). Article 10 provides society with the right to receive information freely and is thus a component of maintaining an open and accessible justice system. Article 8 will often overlap with the protection provided by the Data Protection Law; if disclosure is compliant with the Data Protection Law, it is likely to be compliant with the Human Rights Law. However, Article 8 is not an absolute right: public authorities are permitted to interfere with it where it is necessary, lawful and proportionate to do so (an issue which is a developing area in European and UK law).

Balancing of interests involves an examination on a case by case basis, and balancing the need for judicial accountability with the need for the privacy of the individual. However, the stated view of Jersey's judiciary and over-riding principal is that justice must be seen to be done. Public trust and confidence in the justice system would be jeopardised if judicial hearings were routinely held in private. There is also a need for open and public hearings to satisfy the public or community catharsis. Justice being seen to be done is perceived by the public as a need for criminals to be punished for their acts, otherwise retribution and vigilantism by the public will prevail. To quote Sir Michael Birt, Chief Justice of Jersey:

“It is of the first importance to maintenance of the rule of law that the law and its application by the courts are accessible to the public.”

And as Bentham asserted:

“Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.”⁷

As a direct consequence of these principles, the media also have access to the judgments in the restricted area of the website, although what is subsequently

⁶ Jersey is a Crown Dependency, not part of the EU or the UK, but formulates similar laws in order to facilitate the exchange of information with other countries.

⁷ Bowling, J. (ed.) (1843), *The Works of Jeremy Bentham*, vol. 4, pp. 316-317.

published is subject to protocols agreed with the Court Service. Whilst it is not the intention of this discussion to explore in any depth the issues surrounding freedom of the press, Jersey is no stranger to the need to balance that freedom with the possibility of damage to public or individual interests.

Nevertheless, the need for judicial accountability and for justice to be seen to be done is a significant public interest in its own right, as underpinned by Jacob:

“The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of ‘judging the judges’: by sitting in public, the judges are themselves accountable and on trial.”⁸

Taking a long term view, the combination of permanency, longevity and immediacy of online records can have a detrimental effect, and cause lasting damage to reputation. One example in Jersey is the Employment Tribunal judgments, which have recently been published on the JLIB website. Previously they were on the Tribunal’s own website which was difficult to navigate and thus, to all intents and purposes, suffered from “practical obscurity”. It has been suggested that employers could now easily check judgments before making offers of employment and therefore that someone who had previously been involved in a civil action could be put at a serious disadvantage.

Reverting to criminal offences, the Rehabilitation of Offenders (Jersey) Law 2001 (which broadly follows the UK law) deals with the rights of the individual under certain circumstances for convictions to be regarded as “spent” after a certain period of time, and therefore never alluded to or disclosed to anyone (save in specific circumstances provided for in regulations). Article 11(1) states that any person, who in the course of official duties, has or at any time has had custody of or access to any official record or the information contained in it shall be guilty of an offence if they disclose details of a spent conviction to another person. Article 9 deals with defamation actions where publication takes place after the conviction is spent. However, Article 9(8) permits publication of judicial proceedings in any *bona fide* series of law reports or *bona fide* publication of judicial proceedings given for educational, scientific or professional purposes. Thus the Law enables current and retrospective judgments to be published indefinitely on the JLIB website without fear of defamation action.

3. To promote the better co-ordination of Jersey’s justice system

As the research and development arm of the Court Service, the Jersey Legal Information Board (JLIB) has been involved from the outset with projects aimed at making the criminal justice system and (latterly) the civil justice system better co-ordinated. To this end, a Legal Information Model was commissioned and delivered in 2000, and JLIB has been the catalyst for assisting other agencies to construct end-to-end case management processes. The initial lack of political support stalled the project and it lay dormant for some years, but more recently the multi-agency Justice Systems Board has been formed, chaired by the Chief Justice. JLIB is represented on several of the working parties, and assists with research, seed corn funding and raising awareness of what open access to law entails.

In this way, JLIB helps to make the law more accessible for the public. For example, in 2007 JLIB sponsored a pilot project for community mediation as an alternative

⁸ Jacob, J.I.H. (1987), *The Fabric of English Civil Justice*, pp. 22-23.

means of settling disputes. Administered by the Citizens Advice Bureau, it has benefitted parties by using a trained mediator to produce a satisfactory outcome without the need for a lengthy and expensive court process. The next phase may be an online dispute resolution system, and JLIB will be in a position to champion and sponsor the work to ensure it benefits the population.

4. To support Jersey's position as a leading business centre

The first and second of the strategic aims are simple enough to understand and probably match other jurisdictions' strategies. The third however may be different from those of organisations in other countries established to publish laws and judgments, and it is necessary to understand the background to Jersey's position in order to appreciate why this aim is important.

4.1 BACKGROUND

Jersey had a long-standing favoured tax position, which both benefited goods produced in the Island and also made it a centre for manufacturing. This dates back to 1394 when Jersey was permitted to export goods to England free of tax. This privilege was extended to exports to the colonies in 1468 and can be seen as a necessary counterpart to Jersey's strategic importance to England as a result of its close proximity to the French mainland. A strong, well-fortified Jersey was essential to England during the long-running wars with the French, and tax-free status was deliberately designed to contribute to this. Businesses in Jersey could import raw materials and export manufactured goods to England and its colonies without having to pay any taxes or duties.

In the 19th century and first half of the 20th century Jersey became known for agriculture and tourism. Prior to this time there had been a relatively large cod fishing industry with Jersey men going to the Gaspé coast of Canada between February and October and returning to farm in Jersey in the winter.

Jersey's status began to decline after 1815 and, at the end of the Franco-Prussian War of 1871, the Island ceased to have any strategic value to the UK and therefore no longer benefited from defence expenditure. The unique tax position was eroded between 1851 and 1911 but never abolished altogether, and one significant trend from the 1920s was a new wave of wealthy English settlers, attracted by the lifestyle and personal tax rates that Jersey could offer. During the 2nd World War, the island that had once been so vital to England's security was abandoned by the British as being of no strategic importance and therefore not worth defending. Thus began 5 years of German occupation when most economic activity was limited to food production in order to keep from starvation. After the occupation, as elsewhere in the West, manufacturing started a slow decline and by the 1970's the traditional industries of agriculture and tourism had also declined; they now provide only 1.6% and 3.5% of the Island's Gross Value Added (GVA) respectively.⁹

In the years since 1970, the boom has come in the financial services market which provides 40.5% of GVA and employs over 24% of the Island's workforce. It is self-evident that the government, the States of Jersey, would consider it important to put laws in place to support its claim to being a well regulated jurisdiction. It is imperative for the economy that the outside world perceives Jersey as a desirable place to do

⁹ States of Jersey Statistics Unit, *Jersey Economic Trends 2011*, p.4.

business, and that means having laws and processes that are both easily understood and seen to be working well. The emphasis on regulation is necessary both in a competitive global market-place, where companies can be created almost instantly online anywhere in any offshore finance centre that offers them the most favourable terms, but also in the eyes of the “onshore” powers. For example, the European Union (EU), the UK and the USA have offshore statutory and case law under constant surveillance in order to prevent a loss of tax revenue to their various exchequers.

There was a need in Jersey for new laws to support the financial services industry and to ensure that the legal process was highly visible, and that justice was transparent and operating efficiently. Judgments from all cases, but particularly civil law cases pursued under the Companies or Trusts Laws, could be used to demonstrate the fairness, efficiency and transparency of Jersey’s courts when doing business offshore.

To this end, the Jersey Legal Information Board (JLIB) was established 13 years ago and, shortly after it was founded, it started placing legal materials online on its website.¹⁰ The project was championed by the Chief Justice, who put his not inconsiderable influence behind it. In relation to the website, the aim was to provide online access to all of the Island’s legislation (including subordinate legislation), relevant Orders in Council, Practice Directions, and all judgments of the courts. In the latter case, all authorities cited in judgments were hyperlinked to allow easy navigation to other judgments on the website. Since then, an annual Revised Edition of the legislation has been added, and a separate Revised Edition with case law annotations is published on an ongoing basis. In addition, the website has an online digital library with books on Norman and other customary law dating back to 1535.

4.2 JERSEY LEGAL INFORMATION BOARD AND THE BUSINESS COMMUNITY

“Jersey has established itself as an international finance centre with approximately 50 international banks, and a plethora of sophisticated financial service companies all utilising a highly skilled work force. This industry has been attracted to Jersey by its stable government, high and appropriate standards of financial regulation, geographical closeness to the UK and continental Europe and, of course, its favourable tax regime.”

The quote above is taken from a brochure designed to attract businesses to Jersey. The Economic Development Department, which has responsibility for developing inward business, is at pains to point to stable government as a good reason for locating to Jersey. In another part of the same document, it asserts “As an English Crown Dependency, the Island offers political and economic stability, a flexible, independently endorsed regulatory framework, a tax neutral environment, and a mature and respected legal system.”

Given Jersey’s size, time zone and location, it has the potential to compete fiercely even with larger jurisdictions for a substantial chunk of offshore finance business. The beauty of being a small jurisdiction is that the Island does not suffer from what Richard Susskind refers to as “supertanker syndrome”, in other words it has the ability to change direction quickly and cheaply. In addition, it has a relatively compact body of statute and case law which it has been comparatively easy to make available online. Susskind summarises this phenomenon as follows:

¹⁰ See www.jerseylaw.je.

“The threat to very large players in the information age is that they might be out-manoeuvred by small entrepreneurs, whose ability to make decisions quickly and respond easily to external change is better suited to the fast-moving Internet world. In that context, Jersey and other small jurisdictions may be able to gain competitive advantage over other countries.”¹¹

Business looks to government to provide a supporting and legitimising climate. What international business looks for in a potential jurisdiction is democratic open government with laws operating successfully, and effective and efficient dispute resolution. If it cannot believe in, or does not accept the legitimate position of the government, it will not invest in the jurisdiction. Both government and business have a reciprocal need for each other. Demonstrating democratic access cannot be bad for business, gives confidence that the Island is well regulated and complies with international bodies such as the IMF and OECD. The government has to ensure that potential companies know that Jersey is pro-business with accessible and responsive politicians, minimum state interference and a modern e-business infrastructure.

The structure of JLIB under the law¹² provides for an elected member of the States of Jersey to be appointed by the Minister of Treasury and Resources as a Board member. By default, this has always been the Minister for Economic Development. Other members include the Attorney General, the Judicial Greffier (head of administration of the Courts), the Greffier of the States (head of administration of the States Assembly) and the Law Draftsman, all presided over by the Bailiff (or Chief Justice). In addition, the law provides for other persons to be co-opted as required, for example representatives from the Jersey Law Society and the States of Jersey IT Director.

Part of the Economic Development Department’s remit is to support new and established businesses, encourage inward investment and develop international trade. The publication of all laws and judgments helps to demonstrate to those outside the Island how the law is applied, and how efficiently the courts deal with complex civil matters. In 2003, at the commencement of the law revision project (which was a precursor to making all statute law available online), the Economic Development Minister announced:

“The law revision project is one for the Island as a whole. This project will not only improve access to the law for all, but will also enhance Jersey’s reputation as a place to do business. It will place Jersey on a par with leading jurisdictions with respect to electronic publication of legislation.”

5. Jersey Legal Information Board Funding

The Jersey Legal Information Board website is funded partly by government and partly by subscription. As a result, the website is divided into a public area and an area containing value-added content, the latter catering for the needs of professional users who gain a commercial benefit from using the website, and who therefore pay an annual subscription. Other than the limitations referred to in section 2 above, free and anonymous public access is provided to all statute and case law.

For the professional users, subscriptions are recalculated every three years with the co-operation and approval of the Jersey Law Society. The value-added content

¹¹ Susskind, R. (2000), *Transforming the Law*, p. 274.

¹² See Jersey Legal Information Board (Incorporation) Law 2004 at www.jerseylaw.je.

currently includes the Jersey Law Reports, case law annotations and the online digital library.

Despite being incorporated by statute in 2004, funding for JLIB has been a grace and favour affair; no government Minister has accepted responsibility for funding what is acknowledged to be an authoritative source of information for prospective companies, the legal profession, the finance industry and the public in general. Instead, funding is found on an ad hoc basis at the end of each year from surpluses in the Court Service budget. Fortunately, this has so far sustained JLIB's needs. However, this may not always be the case and the States of Jersey will have to decide at some point whether or not it sees JLIB, and in particular the jerseylaw.je website, as strategically important in attracting new business to the Island; if so, its funding will need to be arranged on a formal footing. If full government funding was received, it may be possible to end subscription charges and make all of the website content (including the value-added areas) free to the public.

There is no doubt that government sees the JLIB website as economically valuable, and the choice of content has therefore been instrumental in guaranteeing its sustainability. As previously referred to, Jersey's body of statute and case law is relatively compact, resulting in the ability to publish in full all relevant materials. Current initiatives are therefore concerned with driving as much traffic as possible towards the website, in order to raise the profile of Jersey as a place to do business. As a result, indexing of the Jersey data now takes place on WorldLII and Justis.

In the eyes of government, publishing comprehensive legal information has become as much an issue about promoting the Island, as about free access to law. As long as this remains to be the case, funding is unlikely to become a significant problem within a small island economy dependent on its international reputation for openness and legal probity.