

Free Access to Legal Information and the Implications for a Small Island State

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Jersey Legal Information Board, Jersey, Channel Islands

Abstract. Jersey is the largest of the group of islands known as the Channel Islands, with a population of 90,000. Jersey covers an area of 45 square miles, is 100 miles south of the English coast and 14 miles from France. As a British Crown Dependency, Jersey is an independent state in virtually all respects, depending on the United Kingdom only for defence and some aspects of foreign representation. Jersey has its own systems of government and justice. Jersey law is essentially indigenous, if based mainly on Norman-French customary law and on English common law; the justice system has similarities with that in England and Wales.

This paper:

- introduces Jersey and the Jersey Legal Information Board (JLIB);
- discusses the political, economic and legal environment that shapes JLIB's service delivery;
- outlines the position on free access to legal information and the difficulties facing JLIB in providing this;
- concludes with future policy.

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

1. Jersey as a Small Island State – Legal, Economic and Financial Position

Jersey is the largest of the group of islands known as 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, not an independent state; but nor is it a colony nor a dominion. It is also not part of the UK or the European Union (EU), save that some special arrangements were negotiated with the EU, for example in relation to customs, agriculture and free movement of people. It does however, have a direct constitutional relationship with the British Crown via the Privy Council. Responsibility for Jersey's affairs rests with the UK Ministry of Justice, but in practice Jersey is self-governing in internal matters with the British government responsible for defence and aspects of international issues.

The Island's legal system came into existence over 800 years ago in 1204 when continental Normandy was lost to the English Crown and the Channel Islands were cast adrift. In order to retain the loyalty of the Channel Islands, King John granted a number of privileges of which undoubtedly the most important was the right to continue to be governed by the laws and customs of the day, in other words essentially the law of Normandy and certain local customs.

While the cultural, economic and political character of Jersey is Anglo-Saxon in nature, the Island spirit is fiercely independent. As Mannin¹ observes:

¹ Mannin, M.L., *Acting Global – Thinking Local: Managing Historic Marginality and Political Change in a small Island 'State'* in *Policy and Politics* Vol. 34 No. 3, July 2006 pp. 387-405.

“Loyalty to the Crown is not in doubt but deference to the British Government is more complex.”

He argues that there is a considerable suspicion of British Government and Parliament (in which Jersey is not represented) and that:

“Jersey exists on the historic margin of UK politics and, by virtue of its traditional autonomy, has been accepted by successive British Governments as a ‘hands off’ island dependency.”

Jersey’s uni-cameral parliament (the States Assembly) is made up of 53 States members; 12 Senators elected on an Island-wide mandate, 29 district based Deputies, and 12 parish based Connétables (administratively, Jersey is divided into 12 parishes). There are no political parties of any substance. However, executive government is provided a Chief Minister supported by a Council of Ministers. Members of the Assembly bring propositions or draft laws to be debated and if passed they go to the Privy Council for Royal Assent. All draft Laws are published on the States Assembly website (www.statesassembly.gov.je) and all adopted Laws appear on the Jersey Legal Information Board (JLIB) website (www.jerseylaw.je).

Until the 1960s, Jersey’s economy was based on tourism and agriculture. However, the opportunity for mass air travel and the lure of warmer European climates began the decline of Jersey as a family holiday destination, just as the advent of the Common Market (later the EU) gave the UK access to cheaper agricultural produce. In its place, a globalised offshore finance industry evolved, facilitated by advances in electronic communication and economic mobility, which today forms over 43% of Jersey’s GDP and employs almost a quarter of Jersey’s labour force (12,770)². This industry and its per capita income make Jersey one of the wealthiest communities in Europe. Unemployment is relatively low and tax revenues from the industry enable Islanders to enjoy a high level of public services.

Jersey’s unique position as an offshore finance centre and a small island state brings its own tensions and its success relies on two assumptions: continued non-interference by the UK and the EU in the Island’s domestic affairs, and maintenance of competitive advantage over other offshore finance centres. In the past, Jersey has stood up well to pressures from the US, the EU and the UK in terms of transparency and disclosure of information, and, in a series of independent reviews, the Island has been found to provide a well regulated financial industry within a sound legislative framework.

JLIB has played a major role in ensuring that the associated 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 Movement³ in 2008.

2. Jersey Legal Information Board

2.1. BACKGROUND

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 probably unique in being a government sponsored agency. JLIB was incorporated under a Law passed by the States Assembly in 2004. JLIB’s vision is for Jersey’s legal system to be, and be

² See *Jersey Economic Trends 2010* <http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=493>.

³ See *Montreal Declaration on Free Access to Law* http://www.worldlii.org/worldlii/declaration/montreal_en.html.

recognised as, the global best for a small jurisdiction, and its strategy is based on the following elements:

- 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.

Shortly after it was founded, JLIB started placing legal materials online on its website. The project was championed by the Chief Justice, who put his not inconsiderable influence behind it. He also wanted to develop JLIB as the research and development arm of the courts, and as a consequence instigated a number of other projects, some of which are still in train while others have come to fruition (such as the creation of an Institute of Law in Jersey).

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 the early days, many further additions have been made including:

- A section for law students (containing, for example, past exam papers).
- A section for providing advice to citizens.
- An online library of legal books and texts.
- Jersey Law Reports (the formal, edited and indexed series of selected judgments, published by Law Reports International).
- An annual revision of all Laws (incorporating all amendments made during the preceding year).
- Annotated versions of selected Laws containing commentaries and hyperlinks to relevant cases.

2.2. INFORMATION GOVERNANCE

JLIB's funding is split equally between an ad hoc grant from government and subscriptions from commercial users of the website who have access to the value-added services it provides. This means that the website has historically been divided into two parts: a "free" area and a "subscribers only" area. Recently, a third part (a "restricted" area within the "subscribers only" area) has been added, the rationale for which is described below.

2.2.1. Free area

The free area of the website provides free and anonymous public access to a range of materials. Essentially, this comprises all of the Island's legislation and the judgments of the courts.

In relation to judgments, the position of free versus subscription access has changed recently. Until a short time ago, the reasoned judgments of the courts as handed down (referred to as the unreported judgments) were in the subscription area, and the Jersey Law Reports were in the free area. The reason for this was that prior to the existence of the website, unreported judgments were distributed to the legal profession only in hard copy, without any redaction. When the website was set up, it was easier to publish unreported judgments in the subscription area for professional use, and give the public access to the Jersey Law Reports which had, as part of the editorial process, been purged of sensitive material. It was always acknowledged that this was an unsatisfactory arrangement, and when JLIB joined the Free Access to Law Movement, it gave impetus to the need to address this position and the problems associated with privacy of the individual versus open justice. The particular

problems of balancing these interests in a small community are discussed later in this paper.

In addition to legislation and judgments, the free area contains a miscellany of reports, guidance, press releases, speeches and information about the legal system in Jersey. This includes a quarterly publication, the Jersey and Guernsey Law Review, which publishes learned articles on all aspects of Channel Islands' jurisprudence. The citizens advice and guidance section is also in the free area, but this year JLIB entered into a partnership arrangement with the local Citizens Advice Bureau (CAB). Research showed that the CAB website was the first port of call for members of the public seeking help, rather than JLIB website (in a ratio of 30:1). After discussions with stakeholders, it was decided that it would be a better use of resources to support CAB in enhancing its website content, rather than duplicating effort on the JLIB website.

2.2.2. Subscribers only area

JLIB's funding relies partially on subscriptions from commercial users of the website. In return, the website provides facilities to assist these users to work more efficiently and productively. As one leading lawyer remarked recently: "Most of our lawyers don't know the way to the firm's library; everything we need is on our desktop." The subscription area comprises a number of value-added services, which are described below.

As indicated previously, the Jersey Law Reports are part of an enhanced service which is aimed at practitioners. Judges select certain unreported judgments concerning matters of lasting legal importance for additional editing, research and indexing (undertaken by Law Reports International).

Annotated Laws are also created by Law Reports International, annotating statute Law with relevant case law, and using hyperlinks to take the user directly from the Law to the relevant paragraph in the Jersey Law Reports. Practitioners have praised the facility as it saves considerable research time.

The legal library is of note given the Norman-French origins of most of the customary law. Some of the books date back to the 16th century, the oldest dating back to 1535, and most are in a fragile condition and scarce supply. Creating electronic versions has meant less handling of the originals and greater access for practitioners and students taking law exams. Currently there are more than 60 volumes on the website. Not all of the books are historic, with new texts being added as and when they become available.

2.2.3. Restricted area

As previously mentioned, unreported judgments, historically, were not in the free area of the website. Judgments prior to 1998 were held only in paper format, and have had to be scanned in. They are not redacted so will be in the restricted area within the subscribers only area, with only a subset of subscribers entitled to access them. In the period 1998 to 2008, judgments were partially redacted but not well enough to be made publicly available, so sensitive ones will also be in the restricted area.

Post 2008, judgments have been fully redacted and will, for the most part, be accessible in the free area of the website. However, there will still be some categories of judgment that will never be freely available for reasons which will be discussed below.

3. Balancing Open Justice with the Need for Privacy of Individuals

3.1. SENSITIVE CASES

For the public to understand and feel connected to the justice system, they need to know how judgments are arrived at. However, as Sudbeck⁴ asserts:

“The rationale underlying public access, that is, judicial accountability, should govern the process of electronic access to court records. However, many courts have allowed advances in technology, rather than the work itself, to drive their electronic processes.”

Early on in the process of enhancing information governance, JLIB consulted with the Data Protection Commissioner and the Children’s Service to draw up a protocol to ensure that the trust built up by long-term work with families in Jersey was not undermined by open access to sensitive cases. Even redacted unreported judgments run the risk of having recognisable elements in them if a casual viewer knows a small amount about a family (for example, number of children, schools or hospitals attended, key dates).

Jersey is a small community (90,000 residents); the judiciary is very conscious that in a jurisdiction of this size there is a thin divide between judicial accountability and the privacy of the individual. However, justice must be seen to be open and to this end the policy is that, wherever possible, defendants must be named in criminal cases, and judgments published in the open area. Leaving aside the historical judgments dealt with above, a decision was required as to what categories of judgment should be in the restricted area, even after redaction. After consultation with the Data Protection Commissioner, the Children’s Service and the judiciary, it was decided to keep the following categories in the restricted area:

- Any Public Law Children cases.
- Adoption cases.
- Sexual assault cases where the victim could be identified.

The default position for any user registering for subscription access will be that they are not entitled to access the restricted area until bona fides have been established. Those to whom access will normally be provided include registered law firms, local media, some government departments (nominated staff only), law enforcement agencies, academics, and the judiciary.

3.2. OPEN JUSTICE VERSUS PRIVACY

Having identified above what JLIB considers to be sensitive material (therefore meriting special treatment) and how it is to be handled, a review of the underlying arguments relating to open justice and privacy may help to explain how these issues have an impact in Jersey, and how relating decisions have been arrived at. As explained above, all but a small proportion of judgments will be available to the general public, and judgments in the restricted area will still be available to those with a genuine need to view them.

The problem with giving full access to the world at large relates to the three categories of judgments referred to above, where information can be deduced about victims or witnesses even after redaction. In a small community, access to this sort of information can have major implications for privacy, with the potential to cause lasting damage to individuals. Historically, the problem was even more acute when judges were perhaps less discrete in producing their judgments. For example, a judgment relating to a burglary of an unoccupied

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.

property might refer to victims by name, property address, or even reason for absence of the victims of the crime; such information would clearly be of future interest to the criminal fraternity. However, judges now follow agreed protocols and procedures to ensure that, in the majority of cases, such information is not divulged in their judgments.

In the past, whether or not judgments were treated in this way was less of an issue due to the “practical obscurity” of court records, arising from the fact that they were paper-based. (“Practical obscurity” refers to the notion that these paper records were difficult and costly to obtain, generally serving to deter the records from being used for purposes other than those for which they were made available.) As Spigelman⁵ explains:

“Open justice has operated in a system which, although access was in theory available to all, there was a high level of what has been called ‘practical obscurity’. The identification of a person’s criminal past or involvement in litigation of any character was not readily ascertainable. It is now.”

It can be argued that there are two approaches to open justice, one being the “balancing of interests” approach, the other being the “public is public” approach. In the latter case, the principle of judicial accountability is rigidly applied and, as the Privy Council⁶ once described it:

“Publicity is the authentic hallmark of judicial as distinct from administrative procedure.”

This view that public records are in the public domain, and therefore access need not be hindered, is less easy to support in an age of electronic media where open access to court records (particularly in a small community) could result in the information being used for inappropriate purposes. On the other hand, the “balancing of interests” approach recognises the importance of accessing information for the purpose of judicial accountability, whilst at the same time upholding the rights of individuals to privacy. As Hoffman and Rowe⁷ explain, the “balancing of interests” approach involves:

“determining what should be done where different rights come into conflict considering the different rights which could apply to the situation, looking at the importance of the interests protected by the different rights, and then judging which right has most weight.”

Effectively, the “balancing of interests” approach is embodied in domestic⁸ and international Human Rights legislation and therefore needs to be operative in some cases, leading to the slightly complicated arrangements (explained above) that JLIB has decided to adopt.

The issue of open justice versus privacy in Jersey could be the subject of a far more extensive discussion. Hopefully, the foregoing description of this issue has not over-simplified the problem, but rather explained why JLIB has had to treat a narrow area of its case law in a special way.

3.3. NEED FOR TRANSPARENCY – OFFSHORE FINANCE CENTRE

As an offshore finance centre, Jersey sometimes suffers from a negative image. This in turn has, in the past, had an effect on the propensity to release information into the public domain.

⁵ Spigelman, J.J. (2003), *Open Justice and the Internet – The Law via the Internet Conference* Sydney, 28 November 2003.

⁶ *McPherson v McPherson* (1936) AC 177.

⁷ Hoffman, D. and Rowe QC, J. (2003), *Human Rights in the UK*, Pearson Education Limited, p.11.

⁸ See Human Rights (Jersey) Law 2000 at www.jerseylaw.je.

Although this problem has largely been addressed, it still remains a cultural legacy in political and administrative affairs. Jersey needs to ensure that what the outside world sees is a well regulated, modern finance industry, not a tax haven; the publishing of all Laws and judgments concerning the offshore finance centre ensures that openness and transparency are the norm today. The Jersey Financial Services Commission was created at around the same time as JLIB to become the regulator of the industry, and has been very successful in producing a trusted environment in which to do business.

JLIB's third strategic pillar is to support Jersey's position as a leading business centre and it does so in various ways. New Laws have been and are being created to accommodate the financial services industry, and these are freely available on the website. Statistics show that the LAWS are regularly accessed from all over the world from organisations looking at Jersey as a place to do business. Not surprisingly, the most frequently accessed LAWS are those concerning financial services.

Judgments concerning a Trust or an overseas company always cause a peak in website traffic when first published. It is this immediacy, transparency and open access that attracts companies to Jersey as a place to do business and, without the website's wealth of authoritative information, Jersey would struggle to remain competitive with other offshore finance centres.

The legal profession is an integral part of the finance industry with law firms of over 150 fee earners operating in Jersey. They need the services of the website to work at the speed required of them in a fast moving industry and JLIB upgrades its offering constantly to meet their requirements. Lawyers cannot advertise their firms on the website, but there is a contact list of lawyers in Jersey with links to their own websites, which is well used by visitors to the website from all parts of the world.

4. Future Directions

4.1. BENEFITS

When JLIB was established in 1999, essentially as a government sponsored project, it did not specifically set out to provide free access to law. Its strategy was enshrined in the three aims of: making the law and legal processes more accessible; promoting better co-ordination of the justice system; and supporting Jersey's position as a leading business centre. These are obviously and desirably core aims of any democratic government and could be paraphrased as follows:

- Promoting public confidence in the justice system.
- Improving the effectiveness and efficiency of the justice system.
- Using the justice system to gain economic leverage.

Whilst issues of copyright and privacy were regularly debated, it was relatively late in the day that the importance of free access to law was established as an objective. Access to all of the Island's legislation had always been intended to be provided freely. Access to case law, however, has been subject to the previously mentioned privacy and revenue generating concerns, until recently.

JLIB has relied heavily on the fact that it has been in the economic interests of the Island to provide free access to legal materials online, in order to procure government funding. Now that the website has developed a reputation as a reliable source of information, the legal, financial and government sectors have all become highly dependent on it. As referred to above, it also makes a significant contribution to the need for transparency in an offshore finance centre.

For Jersey to have arrived at the position it is in today, it has required significant investment of resources and drive from both politicians and senior civil servants. However, being a small island state means that Jersey's body of statute Law and case law is relatively compact and manageable. In other words, the feasibility of making all legal materials available online should be greater in a smaller jurisdiction than in a larger one. As Susskind⁹ puts it:

“In larger jurisdictions, with millions of people and vast libraries of materials involved, the task is more formidable. Indeed they invariably suffer from ‘supertanker syndrome’ – the inability to change direction quickly and cheaply.”

4.2. COST TO GOVERNMENT

There is a cost to government for providing free access to Laws and judgments. For example, the annual legislation revision takes two Law drafting staff several months to prepare. The annotated Laws then need to be updated by Law Reports International to match the revision. This year, 169 Laws were revised, for which the annotations all have to be checked to ensure that they still hold good for the revised Law.

Unreported judgments are published directly to the website by Court Service staff, resulting in a nil direct cost to JLIB. However, the online publication of the Jersey Law Reports by Law Reports International does result in a direct cost to JLIB (though, to some extent, this is now subject to cost recovery from subscribers). It is worthy of note that at the outset, there may be a need to acquire copyright of existing materials published in hard copy, as was the case for JLIB in relation to the Jersey Law Reports (it was also necessary to provide financial protection to the publisher in the event of loss of sales arising from publication of the online version).

In addition to the above issues can be added the overall costs of maintaining a website and constantly developing it to meet users' needs, enhancing and adding content, and providing staff to manage the operation.

JLIB was fortunate to find itself in the position, right from the start, to be championed by the judicial branch of government (sometimes referred to in Jersey as the non-executive branch of government). However, without the additional support of executive government from whom funding has been available, JLIB would have floundered. In addition, a check and balance between the judicial and executive branches of government is maintained by virtue of the fact that the Jersey Legal Information Board (Incorporation) Law 2004¹⁰ establishes JLIB's independence, and the Economic Development Minister is also a member of the Board.

Were government not to have taken the lead in establishing and funding JLIB and the website, it is hard to see who else would have taken on the challenge. As in other jurisdictions, lawyers in Jersey tend to be conservative in outlook, otherwise the Jersey Law Society would have been an obvious organ through which such a project could have developed. A more obvious synergy might be found in the future between JLIB and Jersey's fledgling Institute of Law (established in 2009). The Institute of Law is a non-publicly funded academic institution established to provide legal education for Jersey law students and an English LLB degree course. It is too early to say how the Institute of Law might participate in the dissemination of legal information online.

The only other alternative would have been for JLIB to outsource its entire operation to a third party provider in the private sector. Whilst this option has its attractions and has been

⁹ Susskind, R. (2000), *Transforming the Law*, Oxford University Press, p. 274.

¹⁰ See www.jerseylaw.je.

considered from time to time in the past, and as there is no such provider in Jersey, this would most likely require JLIB to work with one of the major international legal publishers. This approach has its attractions and benefits of scale, and remains under review.

4.3. POSSIBLE FUTURE DEVELOPMENTS

The need to improve the delivery of information and enhance the content of the website is unrelenting. JLIB continually seeks feedback from, and consults with, users of the website.

It is generally agreed that the website provides an essential tool for practitioners but, even though it provides free access to legislation and case law, it does not fare so well in providing advice and guidance for citizens. To remedy this, it is intended that further effort will be made in concert with the Citizens Advice Bureau to deliver this content. Items currently under discussion include:

- Explanatory notes on new laws (currently available with draft Laws presented to the States Assembly but not available once the Law has been passed).
- Video based, and other, guidance on life events.
- Delivery of content in formats suitable for mobile devices.
- Updates of existing Citizens Advice Bureau content sponsored by law firms.
- Guidance on court procedures (relating to, for example, litigants in person, third party planning appeals, guidance for witnesses, defendants and jurors).
- FAQs (frequently asked questions) on a variety of relevant topics.

As part of the process to enhance Jersey's profile internationally, it is intended that information on the website will be cited on other legal information databases. Initially, this will relate to case law only. Preliminary discussion to facilitate this have taken place with BAILII, WorldLII and Justis Publishing.

The most difficult dilemma facing JLIB in the future is how (or whether) to make more (or all) of its content available for free. In an ideal world, government would make more resources available to allow this to happen. In reality, the pressures and demands on the Island's budget are never likely to permit this, least of all during a recession. Under the current model, to make up the gap between what is required and what government provides, JLIB charges users who gain a commercial advantage from using the website for the combination of value-added and free services that it delivers. In the past, this healthy co-existence between private and public sectors has managed to satisfy the need.

There is a continuing need to create sufficient revenue, at the very least to sustain the freely available content. New and creative ways of generating this revenue are continually being sought and, as JLIB grows and develops, a new funding model will no doubt evolve; and that may be the subject of a future paper for this conference.