Editorial

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THIS SPECIAL FEATURE CONSIDERS possible next steps in the struggle for equal access to marriage for same-sex couples in Britain, and elsewhere in the world. It focuses on the outcome of our recent High Court case (*Wilkinson v Kitzinger & Others* [2006] HRLR 36), together with reflections on the judgment from a range of academics and activists (see also www.equalmarriagerights.org). It highlights the intersections between psychology, law, activism and personal experience; and provides an opportunity to consider the value of psychology and psychological expertise in legal con texts. Psychology and psychiatry have been key players in the same-sex marriage debates, especially in the UK and the US (e.g. Barker & Langdridge, 2006; Clarke, Finlay & Wilkinson, 2004; Herdt & Kertzner, 2006; Herek, 2006; Drescher, 2006) and a number of pieces in this Special Feature interrogate their contribution. The Special Feature also encourages reflection on why marriage matters, and why civil partnership - important though it is in according same-sex couples a range of rights and protections - is not enough (see also Wilkinson & Kitzinger, 2006).

The Special Feature consists of an introduction outlining our own legal case and explicating the judgment, followed by nine short reflective pieces, in which scholars and activists consider the implications of the judgment and the possible future for same-sex marriage.

Our Legal Case

In 2006, we brought a legal challenge to the discriminatory marriage laws in Britain (*Wilkinson v Kitzinger & Others* [2006] HRLR 36) - the first case of this kind in Europe. We are a British lesbian couple who were legally married in British Columbia, Canada, in August, 2003, when Sue was living and working there (she had a two-year post as a visiting professor at Simon Fraser University in Vancouver). British Columbia was the second Canadian province (Ontario was the first) to open up marriage to same-sex couples. Canada was, in fact, the first place in which we could legally marry, as unlike The Netherlands and Belgium, it had no citizenship or residency requirements for marriage - not that marriage was an institution to which we particularly aspired, as lesbian-feminists (see Wilkinson & Kitzinger, 2004a). We decided to marry largely for practical reasons: to manage the legal and financial aspects of conducting an inter-continental relationship (Celia was still living and working in England) - but our marriage quickly came to mean a great deal more to us than that, particularly when the British Government took it away.

Our relationship had no legal recognition at all in Britain for the first two years of our marriage. We were 'legal strangers'[1] when Sue returned to England in September, 2004. When the Civil Partnership Act (CPA) came into force in December 2005, our legal marriage was automatically, and against our wishes, altered by the state to a civil partnership in our home country. A British heterosexual couple married in Canada would automatically have that marriage legally recognised and respected as a *marriage* in Britain. We were simply asking for equal treatment.

With legal support and representation from the national civil liberties and human

[1] In other words, we had no more legal rights and responsibilities with respect to one another than if we were two complete strangers.

rights organisation, Liberty, and political support from OutRage!, we went to the High Court to seek a declaration of the validity of our legal (Canadian) marriage in Britain. The Government intervened in the case, opposing the legal recognition of our marriage. Our lawyers' main argument was that any failure to recognise our marriage - as a marriage - is a breach of our human rights under the European Convention on Human Rights, specifically Article 8 (the right to respect for private and family life), Article 12 (the right to marry), and Article 14 (prohibition of discrimination) taken together with Article 8 and/or 12 (since Article 14 is not free-standing). The case was heard in the summer of 2006 by the President of the Family Division of the High Court, Sir Mark Potter (Britain's most senior family judge).

We lost. The court deemed our valid overseas marriage void in Britain. We were also ordered to pay £25,000 of the Government's costs (presumably to deter other couples from bringing similar cases). In his judgment, Sir Mark Potter ruled specifically that:

i. There *is* discrimination against same-sex couples in denying us marriage;
ii. Discrimination against lesbians and gay men is legally justified;
iii. Civil partnerships and marriage are expressly different institutions;
iv. Lesbian and gay couples are not 'families'.

We spell out in more detail below what is meant by each of these claims.

The Judgment

i. There is discrimination against same-sex couples in denying us marriage

The judge agreed that we were discriminated against. The one small (but very significant) point on which we won was that the judge found against the Government's claim that there was no discrimination. The Government's lawyers argued that the 'right to marry' (Article 12) didn't apply to us, since it was always only ever intended to extend that right to unions between people of different sexes (and now, since the Gender Recognition Act, to people of different genders), so there was no discrimination in not recognising our marriage. The judge rejected this argument and said there is discrimination against us. Most importantly, he found discrimination under the ambit of Article 12 (the right to marry). Our case has established that same-sex couples fall within the ambit of Article 12 for the purposes of Article 14 (prohibition of discrimination). This is the first such judgment in the British or the European courts and it is important in opening up the legal scope of claims about discrimination against LGBT people. It is the silver lining in an overall negative judgment.

ii. Discrimination against lesbians and gay men is legally justified

Having found discrimination under the ambit of Article 12 of the Convention (the right to marry), the judge then argued that this discrimination was justified. Again, this argument draws on previous European case law, which states that it is acceptable to discriminate against lesbians and gay men if you do so 'proportionately' and with the 'legitimate aim' of protecting the traditional definition of marriage as between a man and a woman with the primary aim of procreation. According to Sir Mark Potter's judgment, marriage is:

> ... an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or 'nuclear family') in which both maternal and paternal influences are available in respect of their nurture and upbringing. (Para. 118)

Overall, the judgment supports and defends discrimination against lesbians and gay men in the name of protecting the heterosexual nuclear family. This is a very familiar argument not only from previous European decisions but also from court decisions on same-sex marriage earlier in 2006 in New York and Washington.

iii. Civil partnerships and marriage are expressly different institutions

In refusing to recognise our marriage, the judgment confirms the Government's position that civil partnership and marriage are two very different institutions. Although, with the passage of the CPA, many lesbian and gay couples have celebrated 'weddings' and refer to their civil partnerships as 'marriages', the Government is clear that these are not marriages, and that it will not recognise same-sex marriages. The judgment also confirms the Government's previously stated position that, while civil partnerships were designed to extend rights to same-sex couples, they were also designed as a different institution for lesbians and gay men in order to protect and preserve the traditional institution of heterosexual marriage.

iv. Lesbian and gay couples are not 'families'

The judgment confirms the European Court of Human Rights' position that same-sex couples do not constitute 'family' and, therefore, are not entitled to 'respect for family life' (as guaranteed by Article 8 of the Convention) .We argued that our right to respect for our family life Was infringed by the Government's refusal to recognise our marriage. The judge found that we did not have any right to respect for our family life as a lesbian couple, since we are not a family. Ours is now the second case in England in which judges have expressed the view that lesbian and gay male relationships do not constitute 'families'. According to Lord Nicholls, one of the judges in a House of Lords ruling earlier this year about whether or not a lesbian couple constituted a family for the purposes of child support arrangements, 'the European Court of Human Rights does not at present recognise that the Convention guarantee of respect for family life is applicable to this relationship' (*M v Secretary of State for Work and Pensions* [2006] 2 AC 27). This means that civil partnerships do not constitute 'family' under European law.

Where next?

We are deeply disappointed by the judgment - not just for ourselves, but for LGBT families nationwide. The traditional definition of marriage does not reflect the diversity of marriage and family forms in Britain today. Denying our marriage - and our right to family life -does nothing to protect heterosexual marriage and families. It simply upholds discrimination and inequality. The judgment insults LGBT people. It sends the inescapable message that our relationships are inferior to heterosexual ones - not worthy of marriage, only of an expressly different, and entirely separate institution. Separate is not equal.

We are at the end of the road in our own legal challenge. Before a case can be brought to the European Court, it is necessary to 'exhaust domestic remedies'. After losing in the High Court, this means going to the Court of Appeal, and, if necessary, the House of Lords. Bringing such cases could cost £100,000. We are not funded by any group or organisation, and the £25,000 costs bill - which we have had to meet from our own pockets[2] - has exhausted our savings. But we do not intend simply to give up. We want to continue to challenge the segregated system of marriage for different-sex people only and civil partnerships for same-sex people only. We want to see both of these 'expressly different' institutions available to everyone regardless of their sex, gender, or sexuality. How can this goal be achieved? Do others share it - or do they have different visions of the future? And how do they see the way forward?

For this Special Feature, we invited a range of people - both academics and

[2] We would like to thank those who have kindly sent donations towards these costs. Donations may still be made at www.equalmarriagerights.org.

activists - who have been engaged in the same-sex marriage debates internationally to reflect on these issues in the light of Sir Mark Potter's judgment and in the context of their own scholarly work and/or political activity. Nine such contributions are included here.

Two of the contributions specifically address legal routes to change. Rabbi Roderick Young and his husband David Mooney (like us, married in Canada) propose further legal challenges to Britain's discriminatory marriage laws as the way forward. They plan to bring a case, as a Jewish couple, claiming that the prohibition of marriage is an interference with their religious freedom. Other possible legal challenges could include: a same-sex couple legally married in another European country (and domiciled there at the time of their marriage) exercising their right to freedom of movement across EU national boundaries; or a heterosexual couple bringing a case to protest their exclusion from a civil partnership. Following our defeat in the courts, and the high financial penalty imposed upon us, clearly the Government is hoping that nobody else will bring such cases. Rosie Harding also advocates a legal route towards marriage equality (and other human rights claims), and sees it as crucial to overturn the precedent set in the *'M'* (child support) case - and followed in *Wilkinson v Kitzinger* - that same-sex couples do not constitute 'a family' and are not entitled to 'respect for family life' (Article 8). However, she is not sanguine about the future use of human rights arguments as long as the UK fails to ratify Protocol 12 of the European Convention on Human Rights, which provides a general prohibition on discrimination (rather than requiring it to fall 'within the ambit' of another Convention right).[3]

Another contribution, by contrast, considers what psychologists might do to challenge the narrow definition of 'family' and the assumptions made about parenting in Sir Mark Potter's judgment. Victoria Clarke notes the pervasiveness of the argument - in marriage cases and beyond - that the heterosexual nuclear family is the best environment in which to raise children. She calls for challenges to such normative assumptions based on scientific evidence and 'liberal common-sense', together with continuing radical critique.

Three further contributions focus, in particular, on the discrimination instantiated in the judgement: against LGB people, against heterosexuals, and against transsexuals. (For the effects of a gendered definition of marriage on bisexuals and intersex people, see also Kitzinger & Wilkinson, 2006.) Victoria Land and Rose Rickford write as lesbians who feel 'painfully aware' of their exclusion from marriage, and of the fact that LGB relationships are publicly recognised as 'less valuable' than heterosexual ones. They caution LGB people against embracing civil partnerships because of the discrimination they embody. Merran Toerien writes as a heterosexual who would like the legal and social recognition that marriage affords for her own committed relationship. However, she is refusing to marry so long as lesbians and gay men cannot - a strategy adopted by a number of celebrity couples to draw public attention to the continuing discrimination against same-sex couples. Stephen Whittle writes as a trans activist-academic, blending legal analysis and experiential perspectives and his article includes an analysis of legal definitions of sex/gender, and of the institution of marriage itself.

Whittle highlights how the continuing ban on same-sex marriage discriminates, in particular, against married couples in which one member is seeking to transition. In order to obtain full recognition in her/his new gender (under the Gender Recognition Act 2005), the couple must first divorce, then - if they wish their relationship to continue to have legal recognition - enter a civil partnership. A recent decision in the European Court of Human Rights has rejected an application by a married couple (Dian and Anita Parry) that the requirement for Dian to choose between her 45-year marriage with Anita and her right to a gender recognition certificate is a violation of their human rights. The British Government argued that it was appropriate - given that marriage is 'a sensitive area with profound cultural and religious connotations' - for 'a clear "bright line" rule to be maintained, reserving marriage for couples of different sexes'. The Court ruled that the British Government 'cannot be required to make allowances for the small number of marriages where both partners wish to continue notwithstanding the change of gender in one of them' and dismissed the application as 'manifestly ill-founded' *(Parry v UK*, [2006][4]). According to this latest decision in the European Courts, then, the right to marry is defined as a right only to marry a person of a legally different sex.

Two more contributions to the Special Feature highlight the struggles in progress in countries outside Europe - South Africa and Australia - reminding us that that the equal marriage movement is very much an international one. Pierre de Vos outlines the rejection of 'separate but equal' recognition of same-sex relationships in South Africa, drawing parallels with the National Party's policy of apartheid. A combination of court challenges and GLBTI activism led to the passage of the Civil Union Act in late 2006, offering a choice to same-sex couples of marriage or civil partnership. The original Marriage Act remains in place, and only different-sex couples may marry under this legislation (a compromise allowing for 'religious conservatives' to remain separate). Nonetheless, South Africa is generally seen as a success story by the marriage movement - the fifth country in the world to recognise same-sex marriage, and the first on the African continent. de Vos suggests that GLBTI activists in the UK might 're-imagine' the struggle for same-sex marriage as 'akin to the struggle against racial discrimination and oppression'. Leading Australian activist, Rodney Croome, also invokes the history of racial oppression in his country in outlining the marriage debates there - although by contrast with South Africa, Australia is currently a very long way from achieving marriage for same-sex couples. In 2004, the Federal Government of Australia amended the Marriage Act to ban same-sex marriage (as has happened in 20+ US states) - specifically to prevent court challenges similar to our own; then, in 2006, the Government overrode the Civil Union Act newly-introduced by the (self-governing) Australian Capital Territory. Croome's proposals for the future stem from his own experience in Tasmania: the only Australian state to offer same-sex couples the same rights as married couples on formally registering their relationships (although not the right to marriage itself). He attributes this success to winning the hearts and minds of the Tasmanian people, through community education and the sharing of personal stories.

Leading British activist, Peter Tatchell, also applauds the Tasmanian model. Condemning British law on relationship recognition as 'a form of legal apartheid based on sexual orientation', in the final contribution to this Special Feature Tatchell offers the most sustained vision for a future in which - as in Tasmania - all relationships of mutual care and commitment are accorded legal recognition. In addition to offering a choice of marriage or civil partnership to everyone, his proposed new Civil Commitment Pact would allow flexibility and choice: people would be free to nominate

[3] In our case, as it happens, Protocol 12 would have made no difference, since the judge accepted that we *are* discriminated against under Convention Article 12 (the right to marry).

[4] European Court of Human Rights (Fourth Section), sitting on 28 November, 2006. Decision as to the admissibility of application no. 42971/05, by Wena and Anita Parry against the United Kingdom, lodged on 23 November, 2005.

any 'significant other' as their next-of-kin and beneficiary, and to choose from a menu of rights and responsibilities. For some, however, Tatchell's proposals will not go far enough, in limiting individuals to identifying only one 'significant other' (see Barker, 2006; Klesse, 2006). Those who critique same-sex marriage campaigns - and other legal forms of relationship recognition (such as civil partnership) organised around the couple as a unit - may take heart from very recent developments in Canada where three people, a lesbian couple and their male friend who is the biological father of their child, have won a ruling that all three are equal parents to their son.[5]

We are delighted by these - diverse - responses to our invitation to reflect on our High Court judgment and on the future for same-sex marriage. However, there are (at least) four significant omissions from the Special Feature, all geographical: Ireland, Israel, the US and Canada. In Ireland, a case closely paralleling our own has recently been lost (see www.kalcase.org). Katherine Zappone and Ann Louise Gilligan, who - like us - married in British Columbia in 2003, sought a judicial review of the Irish Revenue Commission's decision not to treat them as a married couple for tax purposes. Their case was heard in the Irish High Court in late 2006. Finding against them, Ms. Justice Dunne wrote: 'I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used [in the Irish constitution], relate to a same sex couple'.[6] Psychologists played a major role as expert witnesses in this case - but their testimony made no difference to the outcome. There is a continuing debate about the role of psychology, the value of psychological arguments, and (particularly) the involvement of psychologists as expert witnesses, in same-sex marriage legal cases (see Kitzinger & Wilkinson, 2004b [and responses], 2005; Herdt & Kertzner, 2006) .

By contrast, in Israel a parallel case to our own has been won (Shoffman, 2006; see also Young & Mooney, this issue). Five same-sex Israeli couples married in Canada sought legal recognition of their marriages on the same basis as those of heterosexual Israeli couples married overseas, via registration in the Population Register. Their petition claimed:

> 'Just as it is unacceptable to permit discrimination on the basis of an individual's inclusion in an ethnic or national grouping that is defined by racist perceptions prevalent in our society; and just as there can be no acceptance of discrimination against women that is based on pervasive patriarchal attitudes; there can also be no tolerance of discrimination against same-sex couples resulting from societal homophobia' (quoted in Shoffman, 2006) .

The Israeli High Court judges ruled (six-to-one) that the petitioners' Canadian marriages should be legally recognised in Israel.

In the US, same-sex marriage cases have been fought (and mostly lost) on a state-by-state basis, with Massachusetts remaining the only state to permit same-sex couples to marry.[7] The contemporary debate focuses on the distinction between marriage and civil partnership (and its equivalents), with increasing recognition that, despite the legal parallelism of marriage and civil partnership (in some cases), the two are far from interchangeable socially - not least because the use of different terminology for the two institutions is of deep social significance (see, for example, McConnell-Ginet, 2006; Land & Kitzinger, 2007).

[5] 'Canadian boy can have two moms and a dad High Court rules' - Canadian Press report posted on www.365gay.com on 3 January, 2007.

[6] The full text of the judgment can be downloaded from Zappone and Gilligan's website: www.kalcase.org.

[7] As at the time of writing; attempts to overturn the law in Massachusetts continue.

Further, unlike marriage, civil partnership is not transportable across national boundaries (as Young & Mooney, 2007, this issue, also note). When we were married, in Canada, we referred to each other as 'my wife', and we continue to do so in countries that recognise our marriage. In England we now refer to each other as 'my ex-wife', since we were stripped of our marriage by the UK High Court, which only recognised us as having a civil partnership. When we took a weekend break to Bruges recently, the legal status of our relationship changed three times during the three-hour train journey: we left the UK as de facto civil partners, became legal strangers in France (which does not recognise British civil partnerships), and then regained our marital status as we crossed the border into Belgium, which recognises same-sex marriage.

The most recent US marriage case has been in New Jersey, where the Supreme Court ruled (in October, 2006) that same-sex couples must be accorded all the rights and benefits of marriage, but left it to the legislature to decide whether to do this through opening up marriage or through creating a new institution, civil union. The legislature promptly opted for civil unions. Lesbian and gay lawyers and activists, while welcoming the rights and protections they had gained, saw this segregationist 'solution' as a defeat - as would have been the case in South Africa (see de Vos, this issue) or in Canada.[8] The attorney for the seven New Jersey couples who sued the state for the right to marry, David Buckel, said a civil union bill 'would create one of the largest forms of statutory discrimination ever created in the state'.[9] In vowing to fight on, the Chair of the key campaigning organisation, Garden State Equality, Steven Goldstein, declared: 'So help us God, New Jersey's LGBTI community and our millions of straight allies will settle for nothing less than 100 per cent marriage equality'.[10] The British campaigning organisation, Stonewall - which is apparently content with civil partnerships[11] - is out of step with the same-sex marriage movement worldwide, and with many LGBT people in the UK (iles, 2007).

In the US marriage cases, too, psychology has played a much more extensive role than in Britain. Public policy statements from the American Psychological Association (2004) and the American Psychiatric Association (2005) explicitly supporting same-sex marriage[12] have been widely cited in court, and used by expert witnesses and in *amicus curiae* briefs. The British Psychological Society has issued no such statement (although the Lesbian and Gay Psychology Section has done so: Hegarty *et al.*, 2006).

Finally, although we approached a number of leading marriage activists in Canada - several of whom have become our personal friends - no contribution was forthcoming. We are pleased by this absence, for what it says. In Canada, the struggle for marriage equality has been won,[13] the main campaigning organisation - Canadians for Equal Marriage - has been disbanded, and marriage activists (they tell us) are now simply getting on quietly with living their (married) lives.

[8] The main campaigning organisation, Egale, put it like this in a 2003 press release: 'Registered partnerships are no substitute for equal marriage. Imagine if the federal government prohibited inter-racial couples or Jewish couples from marrying, but said we'll let you register your partnership instead. The very idea is offensive and demeaning.' (Available from www.egale.ca.)

[9] Quoted in Tamari, J. (2006) 'Lawmakers: Gay marriage will take time', *Courier Post*, 31 October, 2006.

[10] Quoted in 'Sounding off on New Jersey's same-sex marriage ruling', *The Advocate*, 26 October, 2006.

[11] In a recent interview for the lesbian magazine, *Diva*, Alan Wardle, Stonewall's parliamentary affairs director, says of same-sex marriage: ' ...it's not one of our key priorities. … In our opinion, all the rights and responsibilities marriage gives have been achieved by CP'. Roberts, E. (2007). Reportage: 'trouble and strife', *Diva*, issue 129 (February), page 84.

[12] The Canadian Psychological Association also issued such a statement (available from www.egale.ca).

[13] Although only recently, with the failure of the (Conservative) Government to win a vote seeking to re-open the marriage debate in December 2006.

For (most of) the rest of us, the struggle continues. Our own case is just one small step in the British - and European - story. The *Parry v UK* (trans) case has just been decided by European Court, and a case brought by Rabbi Roderick Young and David Mooney (see Young & Mooney, this issue) may follow soon. Hearts and minds are slowly changing: the latest survey of public opinion in the European Union (European Commission, 2006) shows that across 25 EU countries, 44 per cent of the population support same-sex marriage (46 per cent in the UK, rising to 69 per cent in Denmark, 71 per cent in Sweden and 82 per cent in The Netherlands). We look forward to the day - perhaps not too long in the future - when there is full equality under the law for same-sex and different-sex couples.

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WHERE IS SAME-SEX MARRIAGE LEGAL?
(As of April 2007)

- The Netherlands, since 2001
- Belgium, since 2003
- Canada, since 2003 in some provinces, federally since 2005
- US state of Massachusetts, since 2004 (at state level only, not at federal level)
  Spain, since 2005
- South Africa, since 2006

Note: Contrary to popular belief, same-sex marriage is not currently available in any of the Nordic countries.