Police to account for unjustified containment of protesters and this may force the police to reconsider their tactics.

Yet the Moos judgment remains very fact sensitive, and may be appealed. In the meantime, we must maintain public pressure on the police to change their tactics. In particular, the concerning development of kettling children as young as twelve years old in the freezing cold, without access to food, water or toilet facilities, sometimes for more than five hours cannot continue. Similarly, kettles imposed pre-emptively, in anticipation of disruption but without clear evidence of an imminent risk of serious disorder can no longer be considered lawful. Even prior to the Moos judgment, many kettles appear to have fallen foul of the Austin requirement that they be imposed for a legitimate purpose. The most obvious example of this is the extensive use of kettling to obtain intelligence, during which protesters have been contained for hours whilst being photographed by police intelligence teams. In many cases police also relied on the extensive powers conferred upon them under anti-social behaviour laws, refusing to release protesters until they provided their details.

Kettling is but one of the problems protesters face. In more general terms, the use of increasingly violent and oppressive tactics means that the police are not only unwilling but also incapable of facilitating peaceful protest. And whilst the state points towards violence amongst protesters, it ignores the fact that kettling and the excessive use of force by police provokes, rather than prevents, violent protest. Further, kettles, and the police aggression and force that invariably accompany them, place protesters at risk of significant harm as illustrated by the case of Alfie Meadows who sustained a brain injury as a result of a baton strike.

In addition, current police tactics criminalise peaceful protest: young people participating in the democratic process are being treated as trouble-makers, when in fact their engagement with social issues should be applauded, particularly where their participation has overwhelmingly manifested itself in peaceful civil disobedience.

No doubt, occupations, marches and sit-ins cause others some minor inconvenience. However these are the methods being used to try to safeguard fundamental aspects of the welfare state. Not only do we now risk losing essential public services, but treating legitimate opposition as criminal dissents dilapidates the tradition of protest and threatens the right to participation of everyday people in society which was so hard gained by our predecessors.

Kat Craig is Co-Vice Chair of The Haldane Society and a solicitor at Christian Khan Solicitors. The firm represents Lois Austin in Austin v the UK as well as numerous children and young people, including Alfie Meadows, challenging police conduct during the recent student protests.

Protest is on the agenda again. From the revolutions in the Middle East, to the student protests against tuition fees in late 2010, the TUC-organised ‘March for an Alternative’ and most recently the riots in Stokes Croft in Bristol against Tesco, crowds of people are taking to the streets in order to express their anger against a general sense of injustice, whether that be the cuts to jobs and services or repression by tyrannical regimes.

While these protests are incredibly inspiring, they have been followed by heightened State repression. The recent waves of student demonstrations against the increase in tuition fees and the abolition of the EMA have led to the arrest of many students and school pupils. Those students arrested and charged have faced allegations including Breach of the Peace, Violent Disorder and Criminal Damage. Some of these offences carry lengthy sentences. In the case of Criminal Damage it can be up to ten years’ imprisonment. Many of those involved in the student demonstrations had never been on a demonstration, let alone witnessed hostile police tactics.

In addition, current police tactics criminalise peaceful protest: young people participating in the democratic process are being treated as trouble-makers, when in fact their engagement with social issues should be applauded, particularly where their participation has overwhelmingly manifested itself in peaceful civil disobedience.

No doubt, occupations, marches and sit-ins cause others some minor inconvenience. However these are the methods being used to try to safeguard fundamental aspects of the welfare state. Not only do we now risk losing essential public services, but treating legitimate opposition as criminal dissents dilapidates the tradition of protest and threatens the right to participation of everyday people in society which was so hard gained by our predecessors.

The events which unfolded during the autumn student protests and more recently at Trafalgar Square on 26th March 2011 have seen the resurgence of the debate on what constitutes legitimate protest, and conversely what powers the police should have to control public protest. The emphasis in the media and amongst the political elite has been on the criminal damage caused and the ‘violence of a minority’. The challenge is now for lawyers to protect the right to protest and where possible question the legitimacy of the powers used to undermine it.

In the UK the right to protest has traditionally been defined as a negative liberty. In other words protest was per-
mitted insofar as it was not prohibited by law. This inevitably led to competing interests such as property rights or the prevention of crime trumping protest rights.

The right to protest remains weakened in three key respects. First, as a result of legislation passed under the guise of combating terror, anti-social behaviour and other criminal activity. Secondly, it is undermined by the way in which the police exercise their statutory powers and finally, it is undermined by the inconsistency of the case law emanating from the courts.

An area of great concern facing protesters is the ambiguous nature of many of the terms used to criminalise their activities. The rule of law requires protesters to know whether their actions or words would incur criminal liability and it is arguable whether terms commonly found in charges that protesters face such as ‘disorderly’, ‘disruptive’, ‘anti-social’ or even ‘violent’ satisfy this requirement.

At the same time this ambiguity gives greater deference to the police. So, for example, we saw the stop and search powers under Section 44 of the Terrorism Act 2000 (since repealed), the use of which did not require police officers to have reasonable suspicion before deciding to search, used to stop, search and limit the movement of protesters and Public Order legislation used to justify the practice of ‘kettling’. Occasionally such practices are successfully challenged in the courts, but the harsh reality is that the majority of people stopped, searched, arrested or kettled will neither know their rights nor have the opportunity to exercise them.

The criminal courts have recently had the opportunity to consider the lawfulness of police actions in the context of demonstrations. In the criminal courts, some of the most interesting and telling factors have been the pleas which have been made by those accused and the use of juries. In the cases of the Gaza demonstrators following demonstrations in London against the Israeli bombing of Gaza in December 2009, six of the known seven cases where the accused pleaded not guilty were found not guilty by the jury or their cases were dropped. However, 35 of those who pleaded guilty were given sentences of between ten and 24 months. In 2000, a jury found Greenpeace director Lord Melchett and 27 activists not guilty of causing criminal damage to a field of genetically modified (GM) crops. More recently juries found seven anti-war activists not guilty in the EDO case in Brighton and environmental activists not guilty in the Kingsnorth Six case.

These cases highlight the importance of wider issues such as trial by jury, and the need for good legal advice and representation. Protest cases are invariably more political in nature and often have the added burden of negative media coverage. Given all of this, the protester who is made to ‘face the full force of the law’, as David Cameron proclaimed following the occupation of Millbank Tower on the 10th November 2010, is in a rather precarious legal position.

Lawyers will be crucial in developing a culture more conducive to public protest as a form of political expression worth protecting rather than something worth penalising or repressing. Defence campaigns will also play a vital role in doing this. In times like these it is important that people are not deterred from protesting by negative media coverage and repressive police tactics.

Fiona McPhail is a trainee solicitor in Scotland at the Legal Services Agency Law Centre. For more information on the campaign to Defend the Right to Protest and to sign the petition see: www.defendtherighttoprotest.org and www.defendbryansimpson.org